Supreme Court, U.S.
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No. ___ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

ANTHONY TORCASIO,

Petitioner,

V.

EDWARD W. MURRAY, DIRECTOR;
G. L. BASS, DEPUTY WARDEN; RUFUS FLEMING;
DAVID L. ROBINSON; R. J. BECK; AND G. P. DODSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fourth Circuit err in holding, contrary to the decisions of the Ninth and Eleventh Circuits, the plain statutory language and Department of Justice regulations, that the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 did not and do not apply to state prisons?

2. Did the Fourth Circuit err in holding that, despite the petitioner's medically recognized disability of chronic morbid obesity, he was not entitled to protection under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990?

3. Did the Fourth Circuit err in holding that respondent prison officials did not violate petitioner's rights under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 by refusing to provide petitioner with dining, toilet, and other cell facilities to reasonably accommodate his physical handicap?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioner Anthony Torcasio
2. Respondent Edward W. Murray
3. Respondent Edward Bass
4. Respondent Rufus Fleming
5. Respondent David L. Robinson
6. Respondent R.J. Beck
7. Respondent G.P. Dodson

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IN THE

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ANTHONY TORCASIO,

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EDWARD W. MURRAY, DIRECTOR; G.L. BASS, DEPUTY WARDEN; RUFUS FLEMING, DAVID L. ROBINSON, R.J. BECK; and G.P. DODSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Anthony Torcasio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on June 29, 1995, which reversed the decision of the United States District Court for the Eastern District of Virginia granting in part and denying in part summary judgment to the respondents based on qualified immunity.

Opinions Below

The opinion of the court of appeals is reported at 57 F.3d 1340 (4th Cir. 1995). The opinion of the district court is reported at 862 F. Supp. 1482 (E.D. Va. 1994). These opinions are reprinted in the Appendix to this Petition.

Jurisdiction

The judgment of the court of appeals reversing in part and affirming in part the judgment of the district court was entered on June 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

Statutes Involved

The statutes involved in this proceeding are Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), as amended, 29 U.S.C. §§ 794-794a (1988), and Title II of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101-12102, 12131-12134 (Supp. 1993) (collectively, the "Acts"), copies of which are reprinted in the Appendix to this Petition.[1]

Statement of the Case

This is an action for damages brought by Anthony Torcasio ("Torcasio"), a morbidly obese former prisoner of the Virginia Department of Corrections ("VDOC"). Torcasio is five feet, seven inches tall, weighs in excess of 450 pounds and has a girth of 78 inches. Torcasio's obesity causes him severely disabling physical problems; he cannot walk for long distances, climb steps, stand or lie down for extended periods; he also experiences extreme back pain. Furthermore, Torcasio's medically diagnosed obesity constitutes a major factor in causing his severe obstructive sleep apnea, which results in weakness, fatigue, memory loss and

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1. References to (__a.) are to pages of the Appendix to this Petition.

possible progressive cardiac failure.[2] While imprisoned by the VDOC, Torcasio requested certain modifications to prison facilities and activities to accommodate his disability, including a handrail around his toilet, a wider cell door, and extra time to travel between buildings. Respondents, prison officials at the VDOC, refused to implement these and other requested accommodations.

In response, Torcasio filed actions in the United States District Courts for the Western and Eastern Districts of Virginia, alleging violations of both the Rehabilitation Act and the ADA. Denying in substantial part respondents' motion for summary judgment in the consolidated cases, the district court held that the Rehabilitation Act and the ADA apply to state prisons and rejected respondents' assertion of a qualified immunity defense for most of petitioner's claims. The Fourth Circuit reversed the decision of the district court, holding that respondent prison officials are fully entitled to qualified immunity on three alternative bases. First, the court held that it was not clearly established in 1993 and 1994 (the time of the incidents alleged by Torcasio) that the Acts covered state prisons. In so doing, the court of appeals went far beyond a mere qualified immunity inquiry and effectively held that the Acts do not apply to state prisons.

The Fourth Circuit's ruling on this point contradicts the language of both the Rehabilitation Act and the ADA and the federal regulations implementing those Acts. In addition, that portion of the Fourth Circuit's opinion addressing the Rehabilitation Act's applicability to state prisons relied on what that court expressly characterized as a conflict in the interpretations of that Act among the Ninth, Tenth and Eleventh Circuits. In the Fourth Circuit's view, that conflict stemmed from the Tenth Circuit's holding in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), which addressed only the narrow issue under the Rehabilitation Act of federal prisoners' rights as prison

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2. Sleep apnea is a temporary cessation of respiration caused by upper airway obstruction. Thomas L. Stedman, *Stedman's Medical Dictionary* 106 (25th ed. 1990).

employees. The Fourth Circuit supplied its own broad reasoning to explain the *Williams* court's holding and then extended that holding to cover state prisoners qua prisoners. As the Fourth Circuit explicitly recognized, this reading of *Williams* brings that decision into direct conflict with both the Ninth Circuit's holding in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), and the Eleventh Circuit's express agreement with the *Bonner* court in *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991), that the Acts apply to state prisons. The Fourth Circuit's ruling on this point, and its extension of *Williams* far beyond its limits, has sown confusion into what was before a settled point of law.

The Fourth Circuit also ruled that, even if the Acts apply to state prisons, it was not clearly established that morbid obesity qualified as a disability under the Acts; this ruling formed the second alternative basis for the court's holding. In reaching this conclusion, the Fourth Circuit defied the commonly accepted means of determining whether a particular condition constitutes a covered disability under the Acts -- *i.e.*, individualized case-by-case analysis. Ignoring settled circuit law to the contrary, the Fourth Circuit applied a broad categorical analysis antithetical to the functional definitions of disability found in the Acts.

For its third alternative basis, the Fourth Circuit relied on its finding that, if the Acts cover morbidly obese state prisoners, respondents' conduct satisfied the objective reasonableness component of the qualified immunity inquiry. To reach this conclusion, the court ignored numerous unresolved material issues of fact, in blatant contravention of circuit court precedent requiring resolution of all material issues of fact before objective reasonableness can be determined pursuant to a qualified immunity inquiry.

This ruling gives state prison officials from Maine to Hawaii the legal authority to cloak themselves in the blanket of qualified immunity to avoid the substantive provisions of the Acts. That incorrect and indefensible result would deprive all disabled state prison inmates -- whether blind, deaf, crippled or morbidly obese -- of the protections against discriminatory treatment guaranteed by Congress.

The Parties

Petitioner Anthony Torcasio is a former prisoner in three correctional facilities within the VDOC. Respondent Edward W. Murray is Director of the VDOC. Respondent Edward Bass is Deputy Warden of the Greensville Correctional Center ("Greensville"), where Torcasio was imprisoned from May 22, 1991 until March 19, 1993. Respondent Rufus Fleming is Warden of Nottoway Correctional Center ("Nottoway"), where Torcasio was imprisoned from March 19, 1993 to April 22, 1993. Respondent David L. Robinson is Assistant Warden of Nottoway. R.J. Beck is the former Warden of the Keen Mountain Correctional Center ("Keen Mountain"), where Torcasio was imprisoned from April 22, 1993 until his release in the spring of 1994. Respondent G.P. Dodson succeeded R.J. Beck as Warden of Keen Mountain.[3]

Torcasio's Confinement by the Virginia Department of Corrections

Torcasio's confinement by the VDOC began in May 1991, when he was processed through the Powhatan Reception Center. Immediately upon arriving, he was placed in the Powhatan infirmary because of his disability. On May 22, 1991, he was transferred to Greensville, where he was again placed in the infirmary because of his disability. Later, Torcasio was moved from the infirmary to the general prison population. While at Greensville, Torcasio lodged a series of formal grievances with the administration there, including specific requests that his cell door be widened to accommodate his girth; that a handrail be installed around his toilet; and that non-skid matting be installed in the lobby. He also requested alternative recreational activities suited to his lack of mobility, and a housing assignment closer to

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3. In its November 15, 1993 decision, the Fourth Circuit affirmed the Eastern District of Virginia's dismissal of petitioner's claims against defendant Vosbeck. *Torcasio v. Murray*, No. 93-6585, slip op. at 2 (4th Cir. Nov. 15, 1993). In its September 16, 1994 decision, the Eastern District of Virginia dismissed petitioner's claims against defendants Terry and Rosenthal. (58a.)

the other buildings in the facility. In addition, Torcasio complained that the dining hall "pod tables" (table tops attached to benches) had insufficient space between the seat and table top to accommodate his weight and girth.

Procedural Background

On August 28, 1992, Torcasio filed a complaint in the Eastern District of Virginia claiming that conditions of his confinement at Greensville violated his rights under the Acts and the Eighth Amendment. That action was dismissed by the district court on May 20, 1993. *Torcasio v. Vosbeck/DMJM, et al.*, Civil Action 3:92CV558 (E.D. Va. May 20, 1993). On appeal, the Fourth Circuit reversed the district court and remanded that action on November 15, 1993. *Torcasio v. Murray*, No. 93-6585 (4th Cir. Nov. 15, 1993). On September 7, 1993, Torcasio filed a second complaint in the Western District of Virginia in connection with his conditions of confinement at Nottoway and Keen Mountain. On December 16, 1993, the Western District transferred the second action to the Eastern District. *Torcasio v. Murray*, Civil Action No. 93-0655-R (W.D. Va. Dec. 16, 1993). On February 16, 1994, the Eastern District consolidated the two actions into the action presently before the Court. *Torcasio v. Murray*, Civil Action No. 3:93CV856 (E.D. Va. Feb. 16, 1994).

The District Court's Decision

On September 16, 1994, the Eastern District ruled that both the Rehabilitation Act and the ADA apply to state prisons. The court held that, "[t]he plain language of the [Rehabilitation] Act counsels for an expansive interpretation of which entities are regulated by the [Rehabilitation] Act . . . ." and that "[b]oth the stated goals and plain language of the [Rehabilitation] Act indicate that state prisons may be subject to the provisions of the Rehabilitation Act." (emphasis added) (46a - 47a.) To support this conclusion, the court cited the Ninth Circuit's decision in *Bonner*, the Eleventh Circuit's decision in *Harris*, and a West Virginia federal district court case, *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W.Va. 1976). Although the district court recognized that the Tenth Circuit's holding in *Williams* cast doubt

on the Rehabilitation Act's applicability to federal prisons, it concluded that the decision did not implicate state prisons. (53a.)

Turning to the ADA, the court found that the Act's definition of "public entity" encompasses the VDOC, noting that that term includes "any state or local government and any department, agency or special purpose district of a state or local government." (48a.) The court further reasoned that the inclusion of state prisons within the ADA's purview was mandated by the Act's broad purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* Last, the court observed that the interim final rules under Title II of the ADA included accessibility guidelines for state and local correctional facilities. *Id.*

After holding that the Acts apply to state prisons, the district court addressed the prison officials' assertion of a qualified immunity defense, examining whether Torcasio's right as a "morbidly obese inmate . . . to the modification of specific services and facilities" was "'sufficiently clear that a reasonable official would understand that . . . [his conduct] violate[d] that right.'" (52a.) The court then applied this qualified immunity inquiry to each of the fourteen specific prison conditions that allegedly violated the Acts and granted the prison officials' motion for summary judgment fully on three claims, in part on three claims, and denying the motion fully on the remaining eight claims.

The instant petition involves only those claims for which the district court denied summary judgment. Those claims consist of the following: lack of toilet handrails, ill-suited "pod tables," narrow cell doors, inadequate tables in the recreational area, lack of non-skid matting in the lobby, various inadequate dining hall facilities, inadequate medical transportation, no personal aid, no seating at the commissary window or pill line, lack of extra time to travel between buildings, and various inadequacies in connection

with Torcasio's confinement in the Nottoway infirmary.[4] (54a - 57a.)

The Fourth Circuit's Decision

The Fourth Circuit reversed the district court in part, finding that respondent prison officials were fully entitled to qualified immunity as to all of petitioner's claims. In so doing, the court went well beyond the question of qualified immunity to conclude that the Acts do not apply to state prisons. Conceding that the Acts "employ language which, when viewed in isolation, appears all encompassing" as to the coverage of Acts (6a), the court nevertheless found that the broad language of the Acts does not evince clear Congressional intent to subject state prisons to the Acts' provisions. (9a - 11a.)

The court then examined case law interpreting the Acts. It recognized that both the Ninth Circuit, in *Bonner*, and the Eleventh Circuit, in *Harris*, have stated that the Rehabilitation Act covers state prisoners. (17a - 18a.) However, the court then cited the Tenth Circuit's decision in *Williams* as conflicting authority. (19a.) Although the *Williams* court merely held that federal prisoners have no protection from employment discrimination under the Rehabilitation Act, the Fourth Circuit articulated its own rationale for the Tenth Circuit's holding. The court then relied on that unsubstantiated rationale to exclude both state and federal prisons from the scope of the Rehabilitation Act. (19a - 20a.)

The court cited no case law to support its conclusion that the ADA does not apply to state prisons. It merely noted that only one previous court squarely held that the ADA covers state prisoners. (14a - 15a.) The Fourth Circuit gave this precedent no deference simply because it was an unpublished district court opinion. *Id.*

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4. In most cases, the court granted the prison officials immunity where the record indicated that they had made any attempt at all to accommodate Torcasio's condition. For five of the claims where summary judgment was denied, respondents' pleadings were nonresponsive on the issue of how they had responded to Torcasio's complaints while he was imprisoned, thereby precluding the court from conducting a qualified immunity inquiry. (57a.)

Relying on its examination of the statutory language, "[t]he conflict between the Ninth and Tenth Circuits on the applicability of the Rehabilitation Act to prisoners", and on its finding that only one district court had held that the ADA applies to state prisoners, the Fourth Circuit held that "it was not . . . clearly established that . . . [the Rehabilitation Act and the ADA] applied to state prisons." (24a.)

The Fourth Circuit also analyzed under its qualified immunity inquiry whether it was clearly established at the time of the incidents that the Acts covered chronic morbid obesity as a disability. Without undertaking an individualized analysis of Torcasio's specific, severe impairments in relation to the definition of "disability" in the Acts, the court concluded that it was not clearly established that the Acts covered the disability of morbid obesity. (25a - 30a.)

Similarly, the Fourth Circuit concluded that, even if it were clearly established that the Acts covered morbidly obese state prison inmates, the objective reasonableness of the respondents' conduct entitled them to qualified immunity protection. (30a - 33a.) Although many material issues of fact regarding the officials' responses to Torcasio's grievances remain unresolved, the court nevertheless held that that very conduct satisfied the qualified immunity inquiry.

Reasons for Granting the Writ

This petition should be granted because the Fourth Circuit's ruling has created at least three conflicts of authority, pitting Circuits against each other on the issues of: (i) the applicability of the Acts to state prisons; (ii) the proper inquiry for determining whether a specific individual constitutes a disabled person under the Acts; and (iii) whether a federal court must resolve all outstanding issues of material fact before conducting the objective reasonableness inquiry under qualified immunity.

Prior to the Fourth Circuit's ruling, the federal courts spoke with one voice, relying on the clear and unambiguous language of the Acts, the regulations promulgated thereunder and relevant case law to conclude that (i) both Acts cover state prisoners; (ii) an individualized inquiry was necessary to determine if a particular condition met the Act's definitions of disability; and (iii) courts

must resolve all material factual issues prior to conducting an objective reasonableness inquiry. Now, federal courts ruling on claims brought by state prisoners pursuant to the Acts face the daunting task of unraveling the confusion engendered by the Fourth Circuit's ruling. This confusion has already led to the untenable result, inapposite to Congressional intent, that state prison inmates in some states are protected by the Acts, while state prisoners in other states are not. Furthermore, state prison officials across the country can rely on the legal confusion left in the wake of the Fourth Circuit's ruling to deny disabled state prisoners the most basic and necessary accommodations. This Court should issue the writ and resolve this conflict in order to avoid needlessly inconsistent rulings on these two important pieces of national legislation and the discriminatory treatment of state prisoners that will inevitably result from the Fourth Circuit's holding.

I. THE FOURTH CIRCUIT'S RULING CREATES A CONFLICT OF AUTHORITY AMONG THE CIRCUITS AS TO THE INCLUSION OF STATE PRISONS WITHIN THE SCOPE OF THE ACTS.

A. THE FOURTH CIRCUIT'S HOLDING ON THE SUBSTANCE OF THE ACTS CREATES A CONFLICT OF AUTHORITY.

1. Rehabilitation Act

Prior to the Fourth Circuit's holding, law in the federal circuits on the issue of the Rehabilitation Act's applicability to state prisons was clear and consistent. In 1988, the Ninth Circuit held in *Bonner* that the Rehabilitation Act applies to state prisons. 857 F.2d at 562. *Bonner* involved a deaf and mute state inmate with severe progressive vision loss and a fourth grade reading ability who was denied the assistance of a qualified interpreter to aid him in a myriad of daily prison activities, including counseling sessions, administrative and disciplinary hearings, and psychological and medical treatment. *Id.* at 560-561. The Ninth Circuit's holding emphasized the Act's broad language applying to "any program or activity receiving federal financial assistance."

The court also found that the Rehabilitation Act's goals of vocational rehabilitation and independent living mirror those of prison officials who are charged with rehabilitating prisoners and preparing them for productive lives outside prison walls. The *Bonner* court summarized this mutually fulfilling relationship between the Rehabilitation Act and prison administration as follows: "[b]y ensuring that inmates have meaningful access to prison activities, such as disciplinary proceedings and counseling, the goals of both the institution and the Rehabilitation Act are served." *Id.* at 562.

In *Harris*, the Eleventh Circuit explicitly agreed with the *Bonner* holding. 941 F.2d at 1522 n.41. *Harris* involved a group of HIV-positive state inmates who claimed that a number of policies of the Alabama Department of Corrections ("ADOC") violated the Rehabilitation Act. Under those ADOC policies, HIV-positive inmates were kept in separate prison housing and were excluded from participating in various prison programs concerning education, employment, community placement, law library use, recreation, dining, religious services, family visitation, transportation, sick call, and canteen. *Id.* at 1521-1522. Although it was not necessary for the Eleventh Circuit to rule on the issue because the ADOC conceded that the Rehabilitation Act applied to state prisons, the *Harris* court explicitly agreed with *Bonner*'s holding on that point. *Id.* at 1522 n.41.[5]

In contrast with the decisions in *Bonner*, *Harris* and *Sites*, *Williams* was brought by a federal prisoner who claimed that prison officials had denied him certain job assignments because of

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5. In *Sites*, the Northern District of West Virginia similarly held that the denial of vocational rehabilitation opportunities to disabled prisoners violated the Rehabilitation Act. 423 F. Supp. at 1197. *Sites* was brought by a seventy-six year old mentally ill state inmate who had then been imprisoned for forty-five years. *Id.* at 1192. The *Sites* court reasoned that, since mentally ill prisoners qualify as handicapped individuals under the Rehabilitation Act, and that since the West Virginia Department of Corrections receives federal financial assistance, "any exclusion of . . . [a state inmate] from participation in a vocational rehabilitation program simply because of . . . [the state inmate's] handicap is forbidden by the [Rehabilitation] Act." *Id.* at 1197.

his disability. 926 F.2d at 996. The Tenth Circuit there held that Title VII, the Age Discrimination in Employment Act and the Rehabilitation Act "provide [the] plaintiff [no] substantive rights because he does not have an employment relationship with the Federal Bureau of Prisons..." *Id.* at 997. (emphasis added). After analyzing the plaintiff's claim squarely within the framework of employment rights, the Tenth Circuit concluded that the Rehabilitation Act "does not give [the] plaintiff any substantive rights since the Federal Bureau of Prisons does not fit the definition of 'programs and activities' governed by that section." *Id.* The logical reading of this last statement limits it to the employment context.[6] The Tenth Circuit did not and could not have meant that the Federal Bureau of Prisons could never qualify as a "program" or "activity" under the Rehabilitation Act because, as discussed in Section I.C *infra*, the Rehabilitation Act's implementing regulations specifically include "department[s] of corrections" within their definition of "program." [7] 28 C.F.R. § 42.540(h) (1995).

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6. The statement by the *Williams* court that "[p]laintiff's claims under . . . [the Equal Pay Act and the Rehabilitation Act] also have additional defects" is *dicta*, since the court had already concluded that the absence of an employment relationship was fatal to the plaintiff's claims. 926 F.2d at 997. Even if these unspecified "additional defects" are viewed as part of the holding, they are limited to the applicability of the Rehabilitation Act to federal prisons. As the Eastern District noted, nothing in *Williams* construes the applicability of the Rehabilitation Act to state prisons. (53a.)

7. The other case cited by the Fourth Circuit, *Haston v. Tatham*, 842 F. Supp. 483 (D. Utah 1994), also involved an employment discrimination claim brought by a prisoner. Although the ADA claim was dismissed because the Act's effective date post-dated the alleged *infra*ction, the court noted that "it is doubtful that the ADA applies in the case of a disabled prisoner who seeks prison employment." (emphasis added) *Id.* at 487. The court based this conclusion on the *Williams* holding, which it correctly construed as contingent upon an employment analysis. In fact, the *Haston* court cited the Tenth Circuit for the proposition that "an inmate's relationship with corrections industries officials arises out of his status as a prisoner rather than his status as an employee." *Id.*

Prior to the Fourth Circuit's ruling, federal courts did not interpret *Williams* as authority regarding the Rehabilitation Act's applicability to conditions of confinement in state prisons. In ruling on Torcasio's claims, the Eastern District of Virginia found that, while *Williams* called into doubt "whether federal correctional facilities are subject to the provisions of the Rehabilitation Act," the decision did not address state correctional institutions. (54a.) Furthermore, the Ninth Circuit in *Bonner* and the Eleventh Circuit in *Harris* were consistent in their rulings that the Rehabilitation Act applies to state prisons. Accordingly, prior to the Fourth Circuit's decision in this case, federal courts had no reason to, and did not, recognize a conflict of authority on the specific issue of the Act's protection of state prisoners.

The Fourth Circuit's holding that the Rehabilitation Act does not apply to state prisons relied on its own strained, *post-hoc* rationale for *Williams* that the Tenth Circuit has never enunciated. The Fourth Circuit began its analysis of *Williams* by restating that opinion's conclusory holding that "'the Federal Bureau of Prisons does not fit the definition of 'programs or activities' governed by [the Rehabilitation Act].'" (19a.) The court recognized that this holding omitted any explanation of why the Bureau of Prisons does not fit within the Rehabilitation Act's terms and conceded that the rationale behind the decision, and not the decision on its face, could potentially bring *Williams* into conflict with *Bonner* and *Harris*. *Id.* Without discussing the particular facts in *Williams*, the Fourth Circuit presented only the following two potential rationales for the holding in that case: (i) the fact that the Bureau of Prisons is a federal agency; or (ii) the fact that the Bureau of Prisons is a prison agency. *Id.* Because the Rehabilitation Act specifically includes Executive agencies within its purview, the Fourth Circuit concluded that the *Williams* holding could not have been based upon the Bureau's status as a federal agency. Since the Fourth Circuit chose to ignore the more logical employment-based explanation for *Williams* - an explanation which complements the definition of "program" found in the Acts' regulations - the court was left with only the Bureau's status as a prison agency to explain the *Williams* decision. Based on this flawed logic, the Fourth Circuit improperly concluded that

Williams stands for the proposition that "prisons of whatever jurisdiction are not subject to the Rehabilitation Act". *Id.*

The Fourth Circuit used its unjustified expansion of the *Williams* holding to buttress its own conclusion that the Rehabilitation Act does not apply to state prisons. (20a.) This greatly expanded reading of *Williams* brought that decision into direct conflict with both the Ninth Circuit's holding in *Bonner* and the Eleventh Circuit's agreement with *Bonner* in *Harris*. *Id.*

2. ADA Implications

The Fourth Circuit also concluded that the ADA does not apply to state prisons. (11a - 16a.); *Staples v. Va. Dep't of Corrections*, No. 3:94CV469 (E.D. Va. July 19, 1995). The Fourth Circuit is presently the only Circuit to have addressed the specific issue of the ADA's coverage of state prisoners.[8] However, the Rehabilitation Act and the ADA were both enacted to prevent discrimination on the basis of physical and mental disability, and many provisions of the Acts mirror each other's language. Furthermore, both the text of the ADA and case law indicate that determinations under the Rehabilitation Act are considered persuasive authority for interpreting analogous provisions of the ADA. *See* 42 U.S.C. §§ 12117(b), 12133 (Supp. 1993); *Smaw v. Commonwealth of Va. Dep't of State Police*, 862 F. Supp. 1469 (E.D. Va. 1994); *O'Neal v. Ala. Dep't of Pub. Health*, 826 F. Supp. 1368, 1373 n.11 (M.D. Ala. 1993). Accordingly, circuit courts ruling on the issue of the ADA's applicability to state prisons now have two sets of precedent from which to choose, virtually ensuring that a conflict of authority on the applicability of the ADA to state prisons will arise unless this Court resolves the existing conflict concerning the Rehabilitation Act.

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8. With regard to the ADA, the Fourth Circuit cited no precedent that the ADA does not apply to state prisons. Rather, the court merely noted that, of the six cases cited by petitions to support the ADA's applicability to state prisons, only one had squarely held on that issue. (14a - 15a.) The other five cited opinions, in the words of the court, "simply assumed that the [ADA] applies to state prisons." (17a.)

B. REGARDLESS OF WHETHER THE FOURTH CIRCUIT'S DECISION CONSTRUES THE SUBSTANCE OF THE ACTS, IT STILL CREATES A CONFLICT OF AUTHORITY.

Although the Fourth Circuit's decision is superficially limited to the issue of qualified immunity, the court's analysis of the Acts' language and relevant case law, as well as the court's absolute language in outlining its view of the Acts' scope, have been recognized as holding that the Acts do not apply to state prisons.

With regard to statutory language, the court focuses on the terms "programs" and "activities" under the Rehabilitation Act, and the terms "services", "qualified individual with a disability" and "public entity" under the ADA. *See* discussion Section I.C *infra*. The Fourth Circuit also predicates its ruling on its analysis of *Williams* and on what it characterizes as a conflict among the Ninth, Eleventh and Tenth Circuits as to the Rehabilitation Act's coverage of state prisoners. *See* discussion Section I.A *supra*.

At least one district court has already based its ruling that the ADA does not apply to state prisons on the Fourth Circuit's opinion in this case. That decision, *Staples v. Va. Dep't of Corrections*, No. 3:94CV469 (E.D. Va. July 19, 1995), involved claims brought by a quadriplegic prisoner of the VDOC at the Greensville Correctional Center, one of the same facilities where Torcasio was imprisoned. In addressing the prisoner's claims, the *Staples* court held that the defendant Correctional Management System could not be held liable under the ADA because:

> ". . . the Fourth Circuit has all but held that the ADA, per se, does not apply in the state prison context. This court is persuaded by the reasoning and dicta of the Fourth Circuit which states absent clear intent on the part of Congress, its enactments do not apply to integral state functions."
>
> *Staples* slip op. at 3.

There can be no doubt that other courts will follow *Staples* and rely on the Fourth Circuit's decision in this case to deny state prisoners the essential protections against discrimination guaranteed by the Acts. The Fourth Circuit's attempt to couch its holding in qualified immunity language can mask neither the nature nor the inevitable impact of its conclusions. The decision is

inextricably tied to the substance of the Acts and will materially affect their application in the prison context.

Even if the Fourth Circuit's holding were limited to the issue of qualified immunity, the decision would still create a conflict of authority. As discussed in Section I.A *supra*, prior to the Fourth Circuit's opinion, courts did not cite *Williams* to exclude state prisons from the scope of the Rehabilitation Act. Now, however, federal courts ruling on the issue of the Acts' coverage of state prisoners will be forced to read the *Williams* holding in conjunction with the Fourth Circuit's rationale; this cumulative reading will lead them to the inevitable conclusion that *Williams* now holds that the Rehabilitation Act does not apply to state prisons, conflicting with *Bonner* and *Harris*.

Based on that conflict of authority, courts will have free license to grant qualified immunity to state prison officials who do not provide accommodations to disabled prisoners because it is not "clearly established" under current law that the Rehabilitation Act and the ADA apply to state prisons. In fact, the *Staples* court recently relied on the Fourth Circuit's opinion to grant qualified immunity to the second defendant in the case, the VDOC. *Id.* at 2 - 3. Thus, even if the Fourth Circuit's ruling were limited to qualified immunity, the decision would still create a conflict of authority.

C. THE FOURTH CIRCUIT'S RULING DIRECTLY CONTRADICTS REGULATIONS UNDER THE ACTS.

The Fourth Circuit's ruling relied in part on its interpretation of certain statutory terms and on the purported lack of clear guidance in the Acts' regulations on the issue of state prisons. The court began its analysis of the statutory language by observing that, as a matter of statutory construction, courts should not apply a federal law where it would interfere with a "core state function" unless there is clear Congressional intent to apply the law in question. (7a - 11a.) The court found that the broadly inclusive language of the Acts, applying the Rehabilitation Act to "'all of the operations of any program or activity receiving Federal financial assistance'" and the ADA to "'any department [or] . . . agency of a state or of a local government'", did not evince such

clear Congressional intent to apply the Acts to prison management.[9] (6a, 11a.)

The court also examined specific terms within the Acts. It opined that prison administrators "do not provide . . . 'programs,' or 'activities'", both within the meaning of the Rehabilitation Act and as those terms are ordinarily understood, because prison officials' chief responsibilities are security and, to a lesser degree, rehabilitation. (13a.) Similarly, the court found that a prisoner could never meet [] . . . the ADA's definition of a "qualified individual with a disability" because the definition includes persons who "'meet [] . . . eligibility requirements for' . . . participation" in certain services and programs; the court reasoned that this aspect of the definition implied a voluntariness incompatible with forced confinement. *Id.* Thus, the Fourth Circuit opined that prisons do not fit within the section heading of the ADA, "Public Services," and the ADA's term "public entity" because those two terms "connote [] a ban on discrimination in services provided to the public, not in the prison context where the public is excluded." (12a.)

The court also focused on sections of the regulations which did not explicitly reference prisons. (20a - 22a.) However, other sections of the regulations promulgated by the Department of Justice ("DOJ") under both Acts clearly and unambiguously state that the Acts cover state prisoners. These regulations evince Congressional intent that the Acts govern the administration of state prisons. Furthermore, the DOJ remains steadfast in its interpretation that the Acts cover state prisoners.[10]

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9. In reaching this conclusion, the court cited a series of cases to support the related proposition that "broadly worded federal statutes are not presumptively applicable to state prisons." Ironically, the cases cited all involve the application of federal labor laws to state prisons. (8a - 9a.) Far from illustrating the Fourth Circuit's desired point, the cases merely restate the *Williams* holding that prisoners possess limited employment rights. *See* discussion Section I.B *infra*.

10. In a letter dated September 22, 1995, the DOJ unequivocally affirmed its view that the Acts apply to state prisons. A copy of the DOJ's letter is included in the Appendix to this Petition.

This Court has on many occasions emphasized that DOJ regulations are drafted under the oversight and with the approval of Congress, thereby necessitating judicial deference. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35 and nn.14-16 (1984); *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). These holdings are consistent with the general rule of statutory construction that courts should exercise deference with regard to administrative interpretations. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

In addition, this Court has specifically stressed the importance of the Rehabilitation Act's regulations, holding in *School Board of Nassau County v. Arline* that the Rehabilitation Act regulations are "'an important source of guidance on the meaning of [the Rehabilitation Act].'" 480 U.S. at 279. Since the ADA's regulations were promulgated by the DOJ under the specific mandate of Congress, *see* 42 U.S.C. § 12134 (Supp. 1993), this Court should also regard them as authoritative interpretations of the ADA. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35 and nn.14-16 (1984); *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

1. Rehabilitation Act Regulations

The DOJ issued regulations implementing the Rehabilitation Act on June 3, 1980; these regulations became effective on July 3, 1980. The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely because of her or his disability, . . . be denied the benefits of . . . any program or any activity receiving Federal financial assistance". (emphasis added) (59a.) Part 42 of the implementing regulations defines the terms "program" and "benefit" as follows:

> "The term program means the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, e.g., a police department or department of corrections." (emphasis added)
>
> 28 C.F.R. § 42.540(h) (1995).

> "Benefit includes provision of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct.)" (emphasis added)
>
> 28 C.F.R. § 42.540(j) (1995).

In addition, the preamble to the implementing regulations provides, under the subheading "Detention and Correctional Agencies and Facilities", that "a sufficient number of detention cells [must] be accessible to wheelchair users". 45 Fed. Reg. 37,620, 37,630 (1980). That preamble continues as follows:

> [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. . . . In making housing and program assignments, such [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy the safety security, and other needs of the handicapped inmate.
>
> (emphasis added) *Id.*

Further regulations issued by the DOJ in 1984 pursuant to amendments to the Rehabilitation Act specifically include Federal prisons within the Act's scope:

> "Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR part 542." (emphasis added)
>
> 28 C.F.R. § 39.170(d)(ii) (1995).

The Fourth Circuit held that prisons do not provide "programs" and "activities" within the meaning of the Rehabilitation Act (13a.) and that "Torcasio's claim that various federal regulations reveal that the applicability of the acts to state

prisons was clearly established is . . . unpersuasive." (20a.) This finding is unambiguously contradicted by the DOJ regulations which contemplate application of the Acts to prisons and include references to prisons in their very definition of "program" and "benefit".[11]

2. The ADA Regulations

The DOJ issued regulations implementing the ADA on July 26, 1991; those regulations became effective on January 26, 1992. Paragraph b(8) of Part 35 of the implementing regulations, entitled "Nondiscrimination on the Basis of Disability in State and Local Government Services," forbids a public entity from establishing eligibility procedures which exclude those with disabilities from fully and equally enjoying a service, program or activity, unless provision of the service makes the eligibility criterion necessary. The implementing regulations were issued in conjunction with a detailed interpreted analysis. The analysis for paragraph b(8) explains that paragraph's scope as follows:

> "[p]aragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution." (emphasis added)
>
> 28 C.F.R. § 35.130 app. A (1995).

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11. As discussed in Section I.A *supra*, these regulations also refute the Fourth Circuit's interpretation of *Williams* by clearly indicating that the Tenth Circuit's conclusion that federal prisons do "not fit the definition of 'programs' or 'activities' governed by [the Rehabilitation Act]," 926 F.2d at 997, cannot constitute a wholesale exclusion of prisons from the Act's scope.

Part 35 also lists the Department of Justice as the designated agency for "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions. . ." (emphasis added) 28 C.F.R. § 35.190(b)(6) (1995).

The Fourth Circuit incorrectly held that prisons do not provide "programs", "activities" and "services" under the ADA. (13a.) Once again, the ADA regulations' references to "inmates" and "correctional institutions" unambiguously refute the Fourth Circuit's holding.

3. Uniform Federal Accessibility Standards

The Uniform Federal Accessibility Standards ("UFAS") were developed by the General Services Administration, the Department of Housing and Urban Development, the Department of Defense and the United States Postal Service pursuant to the Architectural Barriers Act of 1968. The UFAS contains detailed construction requirements and diagrams, originally applicable to federal buildings, designed to insure equal access to buildings by the disabled. The Rehabilitation Act implementing regulations incorporate by reference the UFAS requirements,[12] 28 C.F.R. § 42.522(b) (1995); in addition, DOJ has appended the UFAS requirements to the ADA implementing regulations. 28 C.F.R. § 35.151(c) (1995). The UFAS expressly includes within its scope "institutional occupancies where the occupants are under some degree of restraint or restrictions for security reasons" and lists under that category "jails", "prisons" and "other detention or correctional facilities." 41 C.F.R. § 101-19.6 app. A § 4.1.4(9)(c) (1994).

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12. The Rehabilitation Act regulations also limit exemptions from the UFAS requirements to "mechanical rooms and other spaces that, because of their intended use, will not require accessibility to . . . beneficiaries or result in the employment or residence therein of persons with physical handicaps." 28 C.F.R. § 42.522(2) (1995). By its terms, this exemption could not include residence facilities for disabled prisoners or other spaces that disabled prisoners might frequent.

Cumulatively, these regulations under the Rehabilitation Act and the ADA indicate that correctional institutions, departments of correction, sentencing and confinement are entities and activities subject to the provisions of the Acts. As discussed above, the DOJ issued the Rehabilitation Act implementing regulations on June 3, 1980; those regulations became effective on July 3, 1980, thus preceding Torcasio's induction into the VDOC by more than ten years. The ADA implementing regulations were issued on July 26, 1991, and became effective on January 26, 1992. Both sets of regulations were published and in effect during the period of Torcasio's confinement.

The Fourth Circuit required that "Congress . . . speak unequivocally before we will conclude that it has 'clearly' subjected state prisons to its enactments." (11a.) As these regulations evidence, Congress, through the power it has explicitly delegated to the DOJ, has unequivocally stated that the Acts apply to state prisons. The Fourth Circuit's finding that clear Congressional intent does not exist is clearly wrong.

II. THE FOURTH CIRCUIT'S DETERMINATION THAT MORBID OBESITY WAS NOT A CLEARLY ESTABLISHED DISABILITY AT THE TIME OF THE INCIDENTS CONTRADICTS THE INDIVIDUALLY-FOCUSED QUALIFIED IMMUNITY ANALYSIS USED BY THE FIFTH AND SEVENTH CIRCUITS.

The affirmative defense of qualified immunity shields government officials from civil liability when the officials' actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990) ("an official may be entitled to immunity from suit even where he has violated a plaintiff's rights -- if they were not then 'clearly established' or if a 'reasonable person' in the official's position could have failed to appreciate that his conduct would violate them"). A qualified immunity inquiry involves both "determining whether at the time of the alleged violation the right was clearly established and . . . then determining whether a reasonable person in the officer's position

would have known that doing what he did would violate that right." *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992).

In conducting its qualified immunity analysis, the Fourth Circuit found that "neither the statutes, nor the case law, nor the applicable regulations clearly establish that the ADA or the Rehabilitation Act apply to the obese." (26a.) The court predicated this conclusion on the following: (i) neither the language nor the regulations under the Acts use the term obesity; and (ii) cases finding obese individuals to be covered by the Acts were decided after Torcasio was released. (27a - 30a.) However, the court's analysis failed to include an individualized examination of Torcasio's specific physical impairments; the Fifth and Seventh Circuits have held such an individualized examination to be an integral component of the functional definitions of "disability" under the Acts.

The Rehabilitation Act defines an "individual with a disability" as "any person . . . [with] "a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 706(8)(B)(1988). Similarly, under the ADA, the term "disability" refers to an individual with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual. . ." (65a.)[13]

Both the Fifth and Seventh Circuits have consistently required individualized, case-by-case examinations to determine whether particular impairments constitute disabilities under the Rehabilitation Act. In *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), the Fifth Circuit held that "[a] determination[] of whether an individual is handicapped [under the Rehabilitation Act]. . . [is] necessarily [an] individualized inquir[y]" and "is best

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13. The ADA regulations in turn define "physical or mental impairment" to mean "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or ... any mental or psychological disorder . . ." 29 C.F.R. § 1630-2(h)(l), (2) (1995).

suited to a case-by-case determination." *Id.* at 1396. The Court also noted that "[t]he effect of a given type of impairment . . . can vary widely from individual to individual" and that "[t]he prospect of continuing medical advances in . . . treatment . . . further supports the need for individualized inquiries." *Id.* Similarly, the Seventh Circuit in *Byrne v. Board of Educ. School of W. Allis*, 979 F.2d 560, 564 (7th Cir. 1992), echoed the need for an individualized inquiry conducted on a case-by-case basis and expressed disapproval for courts which "assume, without deciding, . . . [whether] a person's condition constitutes a handicap [under the Rehabilitation Act]."[14]

The Fourth Circuit's attempt to create an analytical distinction between the determination of Torcasio's present status as handicapped and his status at the time of the incidents as "clearly" handicapped fails to account for the court's omission of an individualized discussion of Torcasio's condition. Whether the court conducts a *post-hoc* qualified immunity analysis or a contemporaneous analysis, the court must still conduct an individualized inquiry. If, at the time of the events, Torcasio's physical conditions and limitations clearly placed him within the functional definitions set forth in the Acts, his entitlement as a handicapped or disabled person would be "clearly established", regardless of whether regulations under the Acts specifically used the word "obese" or whether any court had ever previously ruled that a five foot, seven inch, four hundred fifty pound man fit the definitions of disability found in the Acts.

The Fourth Circuit's approach would produce absurd results. Given that the Acts dictate individualized analysis of disabilities, it would be effectively impossible for prison inmates to overcome

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14. This reasoning applies with equal force to the ADA. As noted above, the Rehabilitation Act and the ADA mirror each other in both purpose and language. *See* discussion I.A.2 *infra*. Furthermore, both Acts define "disability" with the same broad language requiring application on a case-by-case basis. In fact, the *Chandler* court looked to the ADA and its regulations for guidance in determining whether the plaintiff's diabetic condition constituted a handicap under the Rehabilitation Act. 2 F.3d at 1391.

the "clearly established" prong of the qualified immunity defense. Ironically, the Fourth Circuit itself noted the incompatibility of its approach with the individualized nature of a disability inquiry under the Acts. The Fourth Circuit stated that: "[g]iven that both the ADA ... and the Rehabilitation Act ... contemplate individualized assessments of whether a person qualifies as an 'individual with a disability,' a plaintiff will often have difficulty showing that it was 'clearly established' that his particular condition brought him within the coverage of either act." (27a.) The Fourth Circuit's approach, by its own admission, would allow prison officials to avoid enforcing the Acts' substantive provisions by endlessly searching for perfect matches, either in statutory language, regulations, or case law, thereby categorizing disabled state prisoners as falling outside the scope of the Acts' coverage.

The individualized standard used by the Fifth and Seventh Circuits stands in sharp contrast to the Fourth Circuit's abstract categorization. Conspicuously absent from the Fourth Circuit's discussion is any mention of the specifics of Torcasio's physical conditions and the myriad ways in which those conditions limit his daily activities. Rather, the Fourth Circuit focuses only on the statutory language, the regulations under the Acts, and relevant case law to determine whether "the applicability of the [A]cts to the [category of the] obese was clearly established." (29a.) The Fourth Circuit's exclusive reliance on these three factors to establish whether Torcasio's particular physical impairment constitutes a "clearly established" disability under the Acts contradicts the individualized, case-by-case analysis used by the Seventh and Fifth Circuits.

III. THE FOURTH CIRCUIT'S CONCLUSION THAT RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY DESPITE THE EXISTENCE OF MANY UNRESOLVED FACTUAL ISSUES CONTRADICTS THE QUALIFIED IMMUNITY STANDARD EMPLOYED BY THE NINTH AND SECOND CIRCUITS.

The Fourth Circuit held that, even if the Acts do apply to morbidly obese state prisoners, the respondent prison officials are still entitled to qualified immunity as to all of Torcasio's claims because their conduct "'could reasonably have been thought consistent'" with Torcasio's rights under the Acts. (30a.) This conclusion directly contradicts the Eastern District of Virginia's decision that the existence of several unresolved issues of fact precluded a qualified immunity finding as to most of Torcasio's claims. (54a - 57a.) More importantly, the Fourth Circuit's decision to ignore those unresolved issues of fact also directly contradicts the qualified immunity standard used by the Ninth and Second Circuits.

The district court found that "material issue[s] of fact" existed as to the respondents' reasonable belief that Torcasio's cell door was wide enough, whether Torcasio was given extra time to travel between buildings, and whether accommodation was needed for Torcasio's toilet. *Id.* In addition, respondents completely failed to address in their pleadings Torcasio's requests regarding the prison building lobby, the dining hall, medical transportation and the commissary window/pill line. (57a.) The Fourth Circuit left undisturbed the district court's conclusion that these and other issues of fact remain unresolved. Rather, the Fourth Circuit merely concluded that "VDOC officials took significant steps to address Torcasio's obesity-related complaints." (32a.)

By classifying the respondents' conduct as "reasonable" without even knowing -- in many instances -- the nature of that conduct, the Fourth Circuit undermined the very part of the qualified immunity analysis that it sought to apply, the objective reasonableness test. The objective reasonableness component logically requires an examination of both the facts as they

transpired and the objective reasonableness of those facts. The Fourth Circuit cannot objectively analyze undetermined facts.

Furthermore, both the Ninth and Second Circuits have recognized the fundamental connection between the resolution of material issues of fact and the objective reasonableness component of the qualified immunity inquiry. In *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), the Ninth Circuit held that "[i]f a genuine issue of fact exists preventing a determination of qualified immunity, . . . the case must proceed to trial." *Id.* at 873. Similarly, the Second Circuit in *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994), held that qualified immunity determinations should be made by the court "only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required." *Id.* at 649. The rule enunciated by the Second and Ninth Circuits applies to the case at hand; the Fourth Circuit's finding of qualified immunity based on the reasonableness of respondents' responses was premature absent specific findings on all the disputed facts involved in the defense of qualified immunity. Moreover, the standard implicitly recognized in the Fourth Circuit's holding -- that courts are free to rule on objective reasonableness without resolving disputed issues of material fact -- directly contradicts the standard employed by both the Second and Ninth Circuits.

IV. THE COURT SHOULD GRANT THE WRIT IN ORDER TO PREVENT THE DISASTROUS RESULTS OF THE FOURTH CIRCUIT'S DECISION.

The Fourth Circuit's decision has created a conflict of authority between the Fourth, Ninth and Tenth Circuits on the question of the Rehabilitation Act's applicability to state prisons. Also, the Fourth Circuit's ruling makes it likely that a conflict of authority will soon arise on the question of whether the ADA applies to state prisons. Furthermore, the Fourth's Circuit's ruling blatantly contradicts the regulations implementing the Acts and relies on an unsupportable interpretation of the Tenth Circuit's decision in *Williams*. If the Fourth Circuit's decision is left undisturbed, state prison officials will never have to abide by the clear mandate of the Acts. Future courts will be forced to either cite the Fourth Circuit decision as precedent with respect to the

Acts' inapplicability to state prisons or grant qualified immunity to prison officials based on the confusion left in the wake of the Fourth Circuit's decision.

Furthermore, the Fourth Circuit's qualified immunity analysis breaks with the established standards employed by other circuits. First, the Fourth Circuit failed to undertake an individualized examination to determine whether Torcasio's particular physical problems constituted a "clearly established" disability within the functional definitions of the Acts. By eschewing the individualized approach required by the Acts and advocated by the Fifth and Seventh Circuits, the Fourth Circuit saddled disabled state prisoners with a burden of proof that will be practically impossible to meet, thereby denying them the basic protections guaranteed by the Acts.

The Fourth Circuit also contravened Second and Ninth Circuit precedent requiring that all material issues of fact be resolved before a court can conduct the objective reasonableness component of the qualified immunity inquiry. Despite numerous unresolved material facts vital to a determination of respondents' objective reasonableness under the circumstances, the Fourth Circuit granted the officials complete qualified immunity. By determining the reasonableness of the respondents' conduct without even knowing the true nature of that conduct, the Fourth Circuit's holding transforms the doctrine of qualified immunity into an impenetrable shield for prison officials who wish to deny disabled state prisoners their rights under the Acts.

Based on the Fourth Circuit's decisions, state prison officials will be free to deny to thousands of disabled state prisoners the most basic of accommodations. The prospect of inconsistent and discriminatory applications of the Acts and qualified immunity inquiries, as well as the substantive weakness of the Fourth Circuit's decision, render it imperative that this Court resolve the existing conflict by issuing the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
September 27, 1995

Respectfully submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-7206

Anthony Torcasio,

Plaintiff-Appellee,

v.

Edward W. Murray, Director; G. L. Bass, Deputy Warden; Mary Sue Terry; Steven D. Rosenthal; Rufus Fleming; David L. Robinson; R. J. Beck; G.P. Dodson,

Defendants-Appellants,

and

Vosbeck/DMJM,

Defendant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-92-558-A)

Argued: April 3, 1995 Decided: June 29, 1995

Before WIDENER and LUTTIG, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

Affirmed in part and reversed in part by published opinion. Judge Luttig wrote the opinion, in which Judge Widener and Senior Judge Phillips joined.

COUNSEL

ARGUED: Mark Ralph Davis, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Criminal Law Division, Richmond, Virginia, for Appellants. Nancy Braverman Blume, HUGHES, HUBBARD & REED, New York, New York, for Appellee. **ON BRIEF:** James S. Gilmore, III, Attorney General of Virginia, Jill Bowers, Assistant Attorney General, Criminal Law Division, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellants. Daniel H. Weiner, HUGHES, HUBBARD & REED, New York, New York; Douglas M. Cott, SPIRER & COTT, Westport, Connecticut, for Appellee.

OPINION

LUTTIG, Circuit Judge:

We consider in this case whether the district court erred when it partially denied qualified immunity to officials of the Virginia Department of Corrections (VDOC) in a suit by a morbidly obese inmate under section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794, and Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132. We conclude that, at the time of the alleged violations, it was not clearly established that these acts applied to state prisoners, or that an obese individual such as appellee Anthony Torcasio was entitled to the protection of either act. We also find that the VDOC officials reasonably could have believed that their actions did not violate any right Torcasio had to modifications in his milieu at the Keen Mountain Correctional Center. Given our determination that the appellant prison officials are entitled to qualified immunity as to all of Torcasio's claims, we affirm the

judgment of the district court to the extent that it found the appellants immune, and reverse to the extent that it did not.

I.

Appellant Anthony Torcasio suffers from what he describes as "morbid obesity." He stands five feet, seven inches tall, weighs 460 pounds, and has girth of 78 inches. His obesity, he claims, causes him a variety of physical discomforts, including back pain and sleep apnea. He is unable to walk long distances, incapable of standing or lying down for prolonged periods of time, and susceptible to losing his balance. In a memorandum he filed with the district court, Torcasio characterized his day-to-day existence as "a life of misery and heartache." J.A. at 87.

Torcasio spent three years as an inmate in the Virginia Department of Corrections, residing at a total of four correctional facilities. The present claim relates principally to his time at VDOC's Keen Mountain facility, where Torcasio was housed from April 22, 1993, until he was paroled in the spring of 1994. During his incarceration, Torcasio presented VDOC officials with a lengthy and ever-increasing list of modifications which he insisted were necessary to accommodate his obese condition. Thus, he demanded a larger cell, a cell closer to the support facilities, handrails to assist him in using the toilet, wider entrances to his cell and the showers, non-skid matting in the lobby area, and alternative outdoor recreational activities to accommodate his inability to stand or walk for long periods of time. When the VDOC officials failed to grant him all of these accommodations, Torcasio filed this action, contending that the officials' intransigence violated "the federal laws enacted by the legislative mandate of the United States Congress that federally protects and ensures the rights of the physically disabled person."[1]

1. The district court properly interpreted Torcasio's *pro se* complaint as invoking the ADA and Rehabilitation Act.

See J.A. at 13, 77. Torcasio sought injunctive relief as well as monetary damages.[2]

In the spring of 1994, as this case was proceeding in district court, Torcasio was paroled. The district court accordingly dismissed those portions of Torcasio's complaint that sought injunctive relief. Proceeding to the remainder of the claims, the district court first held that the ADA and the Rehabilitation Act do apply to state prisoners, thereby rejecting the argument of the VDOC officials that the acts do not apply in this context. *See Torcasio v. Murray*, 862 F. Supp. 1482, 1490-91 (E.D. Va. 1994). The court then addressed the question at issue in this appeal, namely, whether the officials were entitled to qualified immunity. The court first determined that "it is clear that correctional facilities were subject to the provisions of the ADA and Rehabilitation Act" at the time of Torcasio's incarceration at Keen Mountain, *id.* at 1493; this was the extent of the court's inquiry into the essential question of whether the right allegedly violated by the officials — "a morbidly obese inmate's right to the modification of specific services and facilities," *id.* — was clearly established. Having found, to that extent, that the right at issue was clearly established, the court proceeded to analyze, literally request by request, whether the VDOC officials' responses to Torcasio's requests for accommodation were reasonable. The court concluded that, with respect to Torcasio's complaints about

2. The appellants contend that monetary relief is unavailable under the Rehabilitation Act and ADA to remedy discrimination outside of "the employment context." Appellants' Br. at 10-11, 17. The remedies available for ADA violations are those available for Rehabilitation Act violations, and in *Pandazides v. Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994), we held that "suits under [the Rehabilitation Act] provide the plaintiff a full panoply of legal remedies," including monetary damages. *Id.* at 832. We see no basis for reading *Pandazides* as limited to the employment context, as the appellants urge. For purposes of this case, we will assume that monetary damages are available for violations of both acts, because we hold in favor of the appellants on other grounds.

access to the shower, outdoor recreational activities, and his cell, the officials were entitled to qualified immunity, while they were not so entitled on Torcasio's complaints about his toilet, his cell door, and the dining facilities. *See id.* at 1493-95. The Commonwealth then filed this interlocutory appeal challenging the partial denial of qualified immunity.

Our review of the record convinces us that the district court erred in not granting the defendant prison officials' motion for summary judgment on the basis of qualified immunity as to *all* of Torcasio's claims. "Government officials are protected by qualified immunity 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' " *DiMeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). "In analyzing a claim of qualified immunity it is . . . necessary first to identify the specific . . . right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that right." *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In our view, proper application of these principles leads inexorably to the conclusion that the VDOC officials are fully entitled to qualified immunity in this case, because the right Torcasio contends was violated was not clearly established at the time of the alleged violations, and because the actions of the VDOC officials reasonably could have been thought consistent with any rights Torcasio might have had.[3]

3. Because we conclude that the VDOC officials were entitled to qualified immunity, we do not address their alternative defenses that the Rehabilitation Act and ADA afford Torcasio no private right of action against prison officials, and that Torcasio lacks standing to sue because he is not in an employment relationship with the appellants. *See* Appellants' Br. at 8-10, 15-16.

II.

Torcasio contends that by refusing to grant his requested accommodations, officials at Keen Mountain violated "a morbidly obese inmate's right to the modification of specific [prison] services and facilities." Appellee's Br. at 38. The district court found that this right was clearly established during the time Torcasio was incarcerated. We cannot agree.

First, it was not clearly established at that time that the ADA and Rehabilitation Act — the two acts upon which Torcasio's claim of a right to modification of services and facilities is predicated — applied to state prisons. Second, even if it were clear that Torcasio, as a prisoner in a state facility, was protected by the Rehabilitation Act and the ADA, it was not clearly established that, as a "morbidly obese" individual, he qualified as an "individual with a disability" protected under either act.

A.

In attempting to demonstrate that, at the time he was imprisoned at Keen Mountain, it was "clearly established" that the state prisons were subject to the strictures of the ADA and the Rehabilitation Act, Torcasio begins, appropriately, with the language of the two statutes. He contends that there can be no doubt that the ADA and the Rehabilitation Act apply to state prisons, because both acts are written in broad terms that clearly encompass state prisons.

1.

Although when viewed in their entirety, the ADA and the Rehabilitation Act are not so broad as Torcasio suggests, *see infra* p. 10, Torcasio is correct to observe that certain portions of both statutes employ language which, when viewed in isolation, appears all-encompassing. Title II of the ADA outlaws discrimination against the disabled by "public entities," a term which, as Torcasio notes, includes "*any* State or local government" and "*any* department, agency . . . or other

instrumentality of a State or States or local government." 42 U.S.C. § 12131(1) (emphasis added). The Rehabilitation Act, similarly, prohibits discrimination against disabled individuals "under *any* program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (emphasis added), and defines "program or activity" to include "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." 20 U.S.C. § 794(b)(1)(A). We are not persuaded that this language, however, even viewed in isolation from the arguably narrowing text fund elsewhere in the acts, brings state prisons "squarely" within the reach of these acts.

Were we presented with the question whether these acts apply to a state entity other than a prison, we might come to our task with a somewhat different juriprudential mindset. We are hesitant to extend the coverage of the acts to state prisons, however, and especially reluctant to conclude that the applicability of the acts to state prisons was at a given point "clearly established," absent a far clearer expression of congressional intent.

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), the Supreme Court described as an "ordinary rule of statutory construction" the principle that:

> if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys,

> *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Will, 491 U.S. at 65. The Court has thus instructed that where application of a federal statute to a state "would upset the usual constitutional balance of federal and state powers[,] . . . 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero*, 473 U.S. at 243). *See also United States v. Lopez*, 115 S. Ct. 1624, 1655 (1995) (Souter, J., dissenting) (clear statement rule applicable where case "implicat[es] Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States."); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 154 (1944) ("The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation.").

It cannot be disputed that the management of state prisons is a core state function. As the Supreme Court has stated, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, procedures, than the administration to its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Indeed, it is elementary that "maintenance of penal institutions is an essential part" of one of government's "primary functions" – the preservation of societal order through enforcement of the criminal law." *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). The fact that management of state prisons is a core function of the state sovereign, and is not presumptively subject to federal control,

played a significant role in our recent decision in *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir.), *cert. denied*, 114 S. Ct. 238 (1993), in which we held that state prisoners involved in an employment skills development program in prison were not entitled to the minimum wage specified in the Fair Labor Standards Act (FLSA). *See id.* at 133 ("Even with a broad reading of this term ['employee'], we see no indication that Congress provided FLSA coverage for inmates engaged in prison labor programs like the one in this case."); *id.* at 136 ("If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts."). *See also Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991) (Opinion of Trott, J.) ("It is equally plausible, if not more so, that in view of the manifest purpose of Congress in enacting the FLSA, it did not cross any member's mind even – for a moment – that felons serving hard time in prison and working in the process would be covered by this economic protection. I reject as almost whimsical the notion that Congress could have intended such a radical result as bringing prisoners within the FLSA without expressly so stating. There are obvious policy considerations in such a result that should be openly addressed by Congress, not the courts.").[4]

4. Most courts have been similarly unwilling to extend the protections of the FLSA to prison inmates. *See Harker*, 990 F.2d at 135 (citing *Vanskike* v. *Peters*, 974 F.2d 806, 808 (7th Cir. 1992); *Miller* v. *Dukakis*, 961 F.2d 7, 8 (1st Cir. 1992); *Gilbreath*, 931 F.2d at 1325-26, 1328-31). We recognize that some of these courts have refused to adopt a *per se* rule that the FLSA is inapplicable to prisoners, and have instead employed an "economic reality" test, which in theory permits an inmate to qualify as an employee. *See, e.g., Carter* v. *Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984). However, the fact that some courts have followed this course does not, in our view, cast doubt on our premise that broadly-worded federal statutes are not presumptively applicable to state prisons. The FLSA is more plausibly interpreted as applying to state prisons than are the ADA and the Rehabilitation Act, because it contains a list of particular classes of workers who are not entitled to FLSA protections. *See* 29 U.S.C. § 213(a) (exempting, *inter alia*, executives, casual babysitters). This provision supplies some of the specificity lacking from the Rehabilitation Act and ADA, because where Congress has specifically excluded some would-be

(Footnote continued on next page)

That the management of state prisons is to be left to the states, as free as possible of federal interference, is confirmed by a long line of Supreme Court precedent, which we recently had occasion to review in the context of an Eighth Amendment challenge to prison conditions at a state facility. In that context, we concluded that "absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or to substitute their judgment for that of the trained penological authorities charged with the administration of such facilities." *Taylor v. Freeman*, 34 F.3d 266, 268 (4th Cir. 1994) (citing *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled on other grounds, Thronburgh v. Abbott*, 490 U.S. 401, 413-14 (1989); *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). *See also Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C. Cir. 1988). Although the unwillingness of federal courts to intrude into state prison management is in part due to the fact that the judiciary lacks the expertise of the executive and legislature in such matters, it is in significant measure motivated by the realization that principles of comity and federalism apply with special force in the context of correctional facilities. *See, e.g., Preiser*, 411 U.S. at 492 ("[The] internal problems of state prisons involve issues so peculiarly within state authority and expertise"); *Martinez*, 416 U.S. at 405 ("[W]here state penal institutions are involved, federal courts have a further reason [in addition to the inefficacy of judicial intervention] for deference to the appropriate authorities."); *Turner*, 482 U.S. at 85.

(Footnote continued from previous page)

employees from the scope of a statute, the inference can be drawn that Congress intended the act to cover employees not included in that list. *See, e.g., Carter*, 735 F.2d at 13 (relying on this *expressio unius* reasoning).

There can be little question that application of the ADA and Rehabilitation Act would have serious implications for the management of state prisons, in matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security procedures. That the acts threaten to intrude so significantly upon the management of state prisons was fully recognized by the Ninth Circuit, which observed in *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), that "[t]he Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." *Id.* at 1446-47. This recognition in fact led the Ninth Circuit to substantially limit its earlier holding that the Rehabilitation Act is applicable to state prisons, *see infra* n.7.

Given the significant implications of application of the ADA and Rehabilitation Act for the management of state prisons, and therefore for federal-state relations, we simply cannot agree with Torcasio's assertion that the broad, non-specific language contained in the isolated portions of the acts upon which he focuses "clearly establishes" that state prisons are within the acts' coverage. Because the management of state prisons implicates "decision[s] of the most fundamental sort for a sovereign entity," *Gregory*, 501 U.S. at 460, Congress must speak unequivocally before we will conclude that it has "clearly" subjected state prisons to its enactments.

2.

As we have emphasized above, *see supra* pp. 5-6, the seemingly absolute language of 42 U.S.C. § 12131(1) and 29 U.S.C. § 794(b)(1)(A), upon which Torcasio focuses, is not freestanding; these provisions, and their broad language, must of course be read in conjunction with the other operative provisions

of the ADA and the Rehabilitation Act. These other provisions are much less naturally read as including state prisons than are the aforementioned provisions.[5]

Title II of the ADA, upon which Torcasio's ADA claim is based, states that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or the activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The Rehabilitation Act employs virtually identical language. *See* 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). We

5. Moreover, although the definition of "public entity" contained in Title II of the ADA is a broad one, it is still true that prisons are not expressly mentioned in the statute, and they certainly do not come readily to mind as the type of institution covered. As the Commonwealth puts it,

> It would be one thing to conclude that Congress intended that those areas of state prisons to which the free public has access should be adapted to accommodate the handicapped. It is an altogether different conclusion to determine that Congress intended Title II of the ADA to apply inside a prison's living areas

Appellants' Reply Br. at 11 n.10. Even the name ascribed to Title II - "Public Services" - connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded. State prisoners thus do not fit neatly within the definition of "public entities" to which the ADA applies.

imagine that most prison officials would be surprised to learn that they were subject to these laws: "[p]rison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody," *Martinez*, 416 U.S. at 404; they generally do not provide "services," "programs," or "activities" as those terms are ordinarily understood. A prohibition on discrimination in those three realms thus would not seem to reach prisoners.

Similarly, the definition of "qualified individual with a disability" is not naturally read as encompassing inmates in state prisons. Title II of the ADA defines a "qualified individual with a disability," against whom discrimination is forbidden, as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 1213(2). A prisoner is not normally thought of as one who would have occasion to "meet[] the essential eligibility requirements" for receipt of or participation in the services, programs, or activities of a public entity. The terms "eligible" and "participate" imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will.

It is thus only through a superficial reading of the statutes that Torcasio can assert that they clearly encompass state prisons and prisoners. The recognition that the terms of the ADA and the Rehabilitation Act are ill-fitting, at best, in the context of correctional facilities, reinforces our conclusion that the

applicability of the acts to state prisons is far from clear on the face of the laws.

B.

Torcasio might be able to overcome the facial ambiguity of the ADA and Rehabilitation Act, and demonstrate that the applicability of the acts to state prisons was clearly established, if he were able to show that the courts have uniformly interpreted the acts as applying to state prisons, or if he were able to point to regulations that make that applicability clear. His attempts on both scores fail to persuade us, however.

1.

Torcasio claims that "courts have consistently held that the ADA applies to state prisoners' claims." Appellee's Br. at 25. We read the case law differently.

Three of the six cases Torcasio cites to show this consistent pattern of judicial interpretation are unpublished cases. *See id.* (citing *Wagner v. Jett*, No. 94-5522, 1994 WL 532930 (6th Cir. Sept. 30, 1994) (*per curiam*) (unpublished); *Candelaria v. Coughlin*, No. 93 Civ. 3212, 1994 WL 119146 (S.D.N.Y. April 4, 1994) (unpublished); *Outlaw v. City of Dothan*, No. CV-92-A-1219-S, 1993 WL 735802 (M.D. Ala. April 27, 1993) (unpublished)). We generally look with disfavor upon citation of unpublished dispositions, *see* I.O.P. 36.6, and have all the more reason to do so in this case, as citation of *unpublished* opinions seems an unusually ineffective, and even counterproductive, means of demonstrating that a given proposition of law was "clearly established."

Furthermore, only one of the three unpublished opinions in question held what Torcasio claims. *See Outlaw*, 1993 WL 735802, at *4 ("[U]nder common usage and understanding of the terms the jail and all of its facilities . . . constitute a service, program, or activity of the City of Dothan to which the ADA applies."). *Candelaria* in no way "held that the ADA applies to prisons." What the court did hold was simply that an inmate's

Eighth Amendment claim alleging inadequate medical treatment at a prison known as Green Haven "may not be dismissed at this juncture." *Candelaria*, 1994 WL 119146, at *7. The only mention of the ADA in the case came in *dicta*: the court noted in a footnote that

> [t]he quality of Candelaria's health care appears to have deteriorated significantly upon his transfer to Clinton [a prison not implicated in the litigation before the court]. For example, Candelaria claims he is now denied physical therapy, handicapped accessible law library facilities, flush toilets as well as catheters, rectal suppositories and medications that were previously made available to him at Green Haven. These claims are *potentially* legitimate causes of action under both the Eighth Amendment and the Americans With Disabilities Act, codified at 42 U.S.C. § 12101 *et seq*. However, as noted above, [an earlier order] precludes this Court's appraisal of such questions.

Id. at *7 n.2 (emphasis added). For Torcasio to contend that this *dicta* amounts to a holding that the ADA applies to prisons is simply disingenuous.

The Sixth Circuit's unpublished *Wagner* decision not only post-dated Torcasio's release from Keen Mountain, but moreover did not, as Torcasio asserts, "h[o]ld that the ADA applies to state prisoners' claims." Rather, the court in a *per curium* opinion that affirmed the award of summary judgment to prison officials on an ADA claim brought by an inmate, on the grounds that the officials simply had not "treat[ed] disabled inmates unequally under the law." *Wagner*, 1994 WL 532930, at **2. Significantly, although the prison officials apparently did not contend that the law was inapplicable to state prisons, and thus the court had no occasion to consider the question, the court strongly articulated the rationale for *not* applying the ADA to state prisons:

> Prison authorities are entitled to adopt and execute policies and practices that in their judgment are needed to preserve institutional security, even if it requires treating disabled inmates somewhat differently.

Id. The court also acknowledged the need to balance accommodation of disabilities with "legitimate penological interests such as security concerns." *Id.*

Aside from the unpublished cases, Torcasio points to three published district court opinions that, in his view, found the ADA applicable to state prisoners. Even a cursory reading of these cases, however, discloses that Torcasio misrepresents their import. Although all three involved prisoners proceeding under the ADA, none even squarely addressed the question of the ADA's applicability to prisons, much less held that the ADA so applies. In *Noland v. Wheatley*, 835 F. Supp. 476 (N.D. Ind. 1993), for example, the defendants did not argue that the ADA was inapplicable to state prisons, and thus the court did not consider the issue. Instead, the defendants unsuccessfully moved to dismiss the inmate's ADA claim on the grounds that the ADA was not in effect while the plaintiff was in jail, and that the plaintiff was required to exhaust his administrative remedies prior to coming to court. *Id.* at 482-83.[6] In *Harrelson v. Elmore County*, 859 F. Supp. 1465 (M.D. Ala. 1994), the court likewise was not called on to resolve whether the ADA applies to state prisons; all that was before the court in that case, insofar as the ADA is concerned, was the officials' motion to dismiss the inmate's claim for punitive damages under the ADA, which the court granted. *Id.* at 1468-69. Finally, *Clarkson v. Coughlin*, 145 F.R.D. 339 (S.D.N.Y. 1993),

6. The court also rejected the defendants' qualified immunity defense, which apparently also was based on the argument that the ADA was not in effect at the relevant time. *Noland*, 835 F. Supp. at 488.

provides less support still for Torcasio's assertion, as the court in that case simply held – in only five sentences – that a group of deaf inmates would be permitted to amend their complaint to add a claim under the ADA. *Id.* at 348.

Excepting one unpublished opinion, then, courts that have considered suits brought by state prison inmates under the ADA have at most simply assumed that the act applies to state prisons. In no published case has a court been squarely confronted with – much less rejected – the claim that the ADA is inapplicable to state prisoners. We therefore are not persuaded by Torcasio's argument that "courts have consistently held that the ADA applies to state prisoners' claims."

2.

Torcasio's claim that "courts have consistently held that [the Rehabilitation Act] applies to prisons receiving federal financial assistance" is somewhat more substantiable, but not enough so to meet the "clearly established" requirement.

At the time of the alleged violations, the Ninth Circuit was the only court of appeals that had squarely held that the Rehabilitation Act applies to prisons. *See Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988). The Ninth Circuit found persuasive the "broad language" argument Torcasio advances in this case, *see supra* pp. 5-10, and also noted that "the Act's goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete. By ensuring that inmates have meaningful access to prison activities, such as disciplinary proceedings and counseling, the goals of both the institution and the Rehabilitation Act are

served." *Bonner*, 857 F.2d at 562.[7] *Bonner* has since been cited by a number of district courts considering Rehabilitation Act claims brought by prison inmates. *See Donnell C. v. Illinois State Board of Education*, 829 F. Supp. 1016, 1020 (N.D. Ill. 1993) ("Contrary to defendants' assertion, the Act is applicable to inmates at correctional facilities."). *Casey v. Lewis*, 834 F. Supp. 1569, 1583-85 (D. Ariz. 1993) (no claim of non-applicability raised by defendants) (holding that "plaintiffs failed to establish violations of Section 504 of the Rehabilitation Act of 1973").

Torcasio claims that the Eleventh Circuit has also "held" that the Rehabilitation Act applies to prisoners, but this is an overstatement. In *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991), the issue was not before the court, because the Alabama Department of Corrections had "concede[d] that [the Rehabilitation Act] applies to prisoners." *Id.* at 1522. In a footnote, the court noted, in *dicta*, that

> Only the Ninth Circuit appears to have specifically addressed the issue of whether [the

7. Notably, the Ninth Circuit recently retreated from its holding in *Bonner* that the Rehabilitation Act applies to state prisons. In *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994), the court considered "how the Act is to be applied in a prison setting," and observed, "[t]he Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." Thus, the court held that "the applicable standard for the review of the Act's statutory rights in a prison setting [is] equivalent to [the standard for] the review of constitutional rights in a prison setting." *Id.* at 1447. Although *Gates* postdates the period of Torcasio's incarceration, and thus is not directly relevant to the question of whether the applicability of the Rehabilitation Act to state prisons was clearly established at the time of the events at issue in this case, we consider *Gates* to be an indication that the Ninth Circuit is beginning to rethink its decision in *Bonner* that state prisons are subject to the requirements of the Rehabilitation Act.

> Rehabilitation Act] extends to prisoner claims, [citing *Bonner*], finding that the broad language of the Rehabilitation Act covering "any program" that receives federal financial assistance, and with [sic] the congruence of the Act's goals with those of prison officials, suggest that prisoner claims are potentially cognizable under [the Rehabilitation Act]. We agree.

Id. at 1522 n.41. *See also Sites v. McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W.Va. 1976) (no non-applicability defense raised by state) (granting state inmate's motion for partial summary judgment on claim that denial of vocational rehabilitation opportunities to mentally ill prisoners violates the Rehabilitation Act).

While, as of the time Torcasio was incarcerated, one circuit had held that the Rehabilitation Act applies to state prisoners, and another had expressed its approval in *dicta* for that holding, a third circuit had held that the Act is inapplicable to *federal* prisoners. In *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), the Tenth Circuit held that a federal prisoner could not invoke the Rehabilitation Act because "the Federal Bureau of Prisons does not fit the definition of 'programs or activities' governed by [the Rehabilitation Act]." *Id.* at 997. The significance of *Williams* for the question of whether the Rehabilitation Act applies to *state* prisons and prisoners is somewhat unclear, because the court did not elaborate on why the Federal Bureau of Prisons does not "fit the definition of 'programs or activities.'" The explanation could be that federal entities are not subject to the Rehabilitation Act, or that prisons do not sponsor "programs or activities," *see supra* pp. 10-12. If the former understanding is correct, *Williams* is not necessarily inconsistent with *Bonner*, the latter explanation, however, would bring the two cases into direct conflict and thus refute Torcasio's claim that the courts have spoken with one voice on the applicability of the Rehabilitation Act to state prisoners.

We believe the latter interpretation of *Williams* is the more natural. The Rehabilitation Act applies not only to "any [state] program or activity receiving Federal financial assistance," but also to "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). That the Bureau of Prisons is a federal entity therefore would not likely have been the grounds for excluding it from the reach of the Rehabilitation Act. We thus do not understand *Williams* as turning on the federal/state distinction, but rather as ruling broadly that prisons of whatever jurisdiction are not subject to the Rehabilitation Act because they do not sponsor "programs or activities" as those terms are defined in the Rehabilitation Act. Accord *Haston v. Tatham*, 842 F. Supp. 483, 487 (D. Utah 1994) ("[I]t is doubtful that the ADA applies in the case of a disabled [state] prisoner who seeks prison employment." (citing *Williams*)). In any event, the fact that *Williams* can plausibly be read as holding that the Rehabilitation Act is inapplicable to prisoners generally, including state prisoners, significantly undermines the claim that it was "clearly established" that the Act applied to state prisoners.

The conflict between the Ninth and Tenth Circuits on the applicability of the Rehabilitation Act to prisoners is enough to disprove Torcasio's claim that courts have ruled "consistently" on the question, and enough to show as erroneous the district court's conclusion that it was "clear" that the Act applied to state prisons. The caselaw simply provides no support for the claim that it was clearly established that the Rehabilitation Act governed state prisons.

3.

Torcasio's claim that various federal regulations reveal that the applicability of the acts to state prisons was clearly established is equally unpersuasive. For example, Torcasio observes that 28 C.F.R. § 42.503(f), a regulation promulgated by the Department of Justice under the Rehabilitation Act, "ha[s] been found to apply to correctional facilities receiving federal financial assistance," and he thus suggests that the regulation clearly brings state prisons within the coverage of the

Rehabilitation Act. Appellee's Br. at 22 (citing *Bonner*, 857 F.2d at 562). In fact, 28 C.F.R. § 42.503(f) does not even mention state prisons, much less establish that they are subject to the act.[8] The regulation that specifies the entities which are subject to 28 C.F.R. § 42.503(f) and other Department of Justice Rehabilitation Act regulations provides no more guidance, as it states simply that the regulations apply "to each recipient of Federal financial assistance from the Department of Justice and to each program receiving or benefiting from such assistance." 28 C.F.R. § 42.502. The regulations therefore define the reach of the Rehabilitation Act using the same broad language as does the Act itself; as we stated above, this broad language is insufficient to clearly establish that the Act applies to state prisons. Torcasio makes much of the fact that the Ninth Circuit in *Bonner* found 28 C.F.R. § 42.503(f) applicable to state correctional facilities receiving federal financial assistance, *see Bonner*, 857 F.2d at 562, but for his argument to succeed he must show that the regulation *itself* speaks clearly on this point, which he cannot.

With respect to the ADA, Torcasio points not to final regulations promulgated by the Department of Justice, but rather to the Americans With Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which have been developed by the Architectural and Transportation Barriers

8. 28 C.F.R. § 42.503(f) states simply that "[a] recipient that employs fifteen or more persons shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance. Such auxiliary aids may include brailled and taped material, qualified interpreters, readers, and telephonic devices. Attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature are not required under this section. Departmental officials may require recipients employing fewer than fifteen persons to provide auxiliary aids when this would not significantly impair the ability of the recipient to provide its benefits or services."

Compliance Board (ATBCB). *See* 36 C.F.R. § 1191 App. A; 59 Fed. Reg. 31,676 (1994). The ADAAG clearly contemplate the application of the ADA to state prisons, as the guidelines subject "detention and correctional facilities" to various general accessibility requirements, *see* 36 C.F.R. § 1191 App. A at 12.1, as well as to a number of correctional-facility-specific requirements, *see, e.g., id.* at 12.5.2(3) ("Beds shall have maneuvering space at least 36 in (915 mm) wide along one side."). Nonetheless, the guidelines do not show that the applicability of the ADA to state prisons was clearly established at the time Torcasio was in prison in Virginia.

First, and most importantly, the guidelines pertaining to detention and correctional facilities did not become effective until December 20, 1994, some six months after Torcasio was paroled. *See* 59 Fed. Reg. 31,676. Thus, while the guidelines may provide some evidence that it is *now* established that the ADA applies to state prisons, they are of no help to a claim that this applicability was clearly established at the time of the alleged violations in this case. Indeed, until the publication in June 1994 in the Federal Register of the proposed guidelines applicable to prisons, the ADAAG – which had been in effect since their adoption by the Department of Justice in the form of final regulations on July 26, 1991 – did not mention state prisons in either the generally-applicable specifications or in the list of requirements applicable to particular types of buildings and facilities covered by the ADA. During the time Torcasio was incarcerated, therefore, VDOC officials looking to the applicable regulations would not have found any provisions dealing specifically with state prisons, and thus could reasonably have been expected to conclude that they were not covered by the Act.[9]

9. Torcasio protests that the effective date of the ADAAG is immaterial. He argues that the very fact that the ATBCB was conducting a rulemaking, complete with comments from concerned prison officials, while Torcasio was imprisoned attests to a general understanding that the ADA would apply to state prisons. We reject this claim, because the "clearly established"

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The second shortcoming or Torcasio's reliance on the ADAAG is that the Department of Justice, and not the ATBCB, retains responsibility for issuing final regulations implementing Title II of the ADA. *See* 42 U.S.C. § 12134. While the final regulations of the Department of Justice are to be consistent with the ADAAG, until such time as those final regulations are promulgated, the ADAAG remain purely advisory.[10] Finally, we note that Torcasio is undermining his own claim by invoking the ADAAG, because these guidelines apply only to "*newly designed* or *newly constructed* buildings and facilities and *altered portions*[11] of existing buildings and facilities." 35 C.F.R. § 1191

(Footnote continued from previous page)

inquiry is an objective inquiry, and does not turn on what the ATBCB and various prison officials responded to a notice of proposed rulemaking might believe to be the reach of the ADA. The ATBCB and various prison officials responding to a notice of proposed rulemaking might be insufficiently attuned to the considerations of federalism implicated by a proposal to apply the ADA to state prisons. *See* J.A. at 286 (Appellants' motion for summary judgment) ("Even if one were to assume that the [ADAAG] would ultimately result in a final published rule, the defendants would then contend that such a rule is arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law.").

10. The Department of Justice has published a notice of proposed rulemaking seeking public comments on the proposal to incorporate into regulations the ADAAG provisions dealing with correctional facilities, but apparently has not acted further in this regard.

11. "Alteration" is defined in the AADAAG as "a change to a building or facility... that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. . . . Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they

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App. A at 4.1.1 (emphasis added). To the extent that they define a state prison's obligations under the ADA, therefore, the ADAAG suggest that Keen Mountain was under no obligation to grant Torcasio's proposed modifications, because Torcasio has not alleged that Keen Mountain was newly constructed, newly designed, or altered during his incarceration. Were we to get beyond the qualified immunity inquiry, then, the very regulations on which Torcasio relied to overcome the qualified immunity bar would prove to be his undoing on the merits of his ADA claim. *See also* 59 Fed. Reg. 31709 (comment on proposed guideline) ("The specifications for toilet rooms in ADAAG 4.22 and for bathing facilities in ADAAG 4.23 include requirements for grab bars at toilets, showers, and tubs. In the prison environment, such elements must be properly secured so that they cannot be removed and used as weapons."); id. at 31703 (comment on proposed guideline) ("A few commenters stated that while grab bars are easy to secure in new construction, to do so as an alteration or retrofit may necessitate reconstruction of cell walls.").

C.

For the foregoing reasons, we conclude that, although the ADA and the Rehabilitation Act were both in effect at the time of the alleged violations, it was not then clearly established that either statute applied to state prisons. We suspect that the district court reached the opposite, erroneous conclusion because of the order in which the court addressed the defenses raised by the VDOC officials. Rather than begin with the prison officials' claim that they were entitled to qualified immunity because the applicability of the acts to state prisons was not clearly

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affect the usability of the building or facility." 36 C.F.R. § 1191 App. A at 3.5.

established, the court first considered their defense that the acts do not apply to state prisoners. In a recent decision of this court, we reminded district courts that they are to consider *as a threshold matter* whether officials in a given case are entitled to qualified immunity, and move on to other issues only after concluding that the officials are not. *See DiMeglio*, 45 F.3d at 797 ("[I]n deciding qualified immunity claims, courts should determine whether the plaintiff has alleged the violation of a . . . right that was clearly established at the time of the defendant's actions, before they proceed to address ancillary issues.") (citing *Siegert* v. *Gilley*, 500 U.S. 226 (1991)). This case illustrates the dangers of not adhering to this analytical sequence, for we cannot help but suspect that the court's conclusion that it was clearly established that the acts applied to prisons was heavily influenced by its earlier conclusion that the acts *today* apply to prisons.[12]

III.

The district court's ruling that "a morbidly obese inmate's right to the modification of specific [prison] services and facilities" was clearly established while Torcasio was imprisoned

12. Because we find that the applicability of the acts to prisons was not clearly established at the time in question, it follows *a fortiori* that the more specific right of prisoners to the particular accommodations requested by Torcasio was likewise not clearly established. As even the district court noted, "the extent of an institution's affirmative duties to accommodate an individual with [Torcasio's] disability was not clearly defined," *Torcasio*, 862 F. Supp. at 1493, and "[n]o United States Court of Appeals has provided guidance on what might constitute reasonable accommodation of a morbidly obese inmate," *id.* at 1493 n.10. Putting aside for the moment the district court's erroneous conclusion that it was clearly established that the acts applied to state prisons, these observations alone should have led the court to grant qualified immunity on all claims, because, as we have repeatedly noted, the Supreme Court has directed courts to focus on the right alleged at a very specific level when deciding questions of qualified immunity. *See, e.g., DiMeglio*, 45 F.3d at 803 (citing, *inter alia*, *Anderson* v. *Creighton*, 483 U.S. 635, 639-41 (1987)).

at Keen Mountain suffers from a second defect, namely the erroneous assumption that it was clearly established that obese individuals such as Torcasio qualify as "individuals with disabilities" entitled to the protections of the ADA and Rehabilitation Act. The court never addressed this essential issue, presumably because VDOC officials in their motion for summary judgment "concede[d] that plaintiff's condition of morbid obesity, or at lease some of his physical impairments resulting from his obesity, qualify him as a handicapped person within the meaning of the Rehabilitation Act and the ADA." J.A. at 287. Once again, however, there is an important distinction between the question of whether the acts apply to obese individuals, and the question of whether it was clearly established that the acts apply to obese individuals. The prison officials' concession on the first question is not tantamount to a concession on the second,[13] and we therefore must confront the question whether it was clearly established while Torcasio was in prison that, as an obese individual, he was entitled to the protection of the Rehabilitation Act and the ADA. We find that neither the statutes, nor the caselaw, nor the applicable regulations clearly establish that the ADA or the Rehabilitation Act apply to the obese.[14]

13. Indeed, the VDOC officials contend strenuously here that it was not clearly established that the acts apply to obese individuals. *See* Appellants' Br. at 21-23.

14. Torcasio also claims that "whether [his] obesity constitutes a disability under the ADA is necessarily a question for the trier of fact to decide, and it would have been improper to resolve that issue on motion for summary judgment." Appellee's Br. at 28. The question before us, of course, is not whether Torcasio's obesity in fact constitutes a disability, but whether it *was clearly established* that his obesity amounts to a disability. This latter question is a question for the court to resolve. *See DiMeglio*, 45 F.3d at 795 ("[B]ecause the question of immunity is essentially a legal question, '[i]mmunity should ordinarily be decided by the court long before trial.'" (citations omitted)).

Torcasio wisely does not contend that the statutes themselves indicate that they apply to the obese. The ADA defines "disability" simply as "with respect to an individual[15] — a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). The Rehabilitation Act employs a virtually identical, and equally unilluminating, definition. *See* U.S.C. § 706(8)(B)(i) ("[T]he term 'individual with a disability' means . . . any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities.").[16]

The acts themselves do not define "physical or mental impairment" or "major life activity," instead leaving that task to the applicable regulations. These regulations, in turn, provide little additional guidance. The Department of Justice regulations interpreting the ADA define "physical or mental impairment" as

> [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive,

15. Given that both the ADA, *see Ennis v. Nat'l Assoc. of Bus. and Educ. Radio, Inc.*, No. 94-1585, 1995 WL 289655 (4th Cir. May 15, 1995), and the Rehabilitation Act, *see Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986), contemplate individualized assessments of whether a person qualifies as an "individual with a disability," a plaintiff will often have difficulty showing that it was "clearly established" that his particular condition brought him within the coverage of either act.

16. Both acts also consider an individual to be disabled if he (a) has a record of an impairment that substantially limits one or more of his major life activities, or (b) is regarded as having such an impairment. *See* 42 U.S.C. §§ 12102(2)(B)-(C); 29 U.S.C. §§ 706(8)(B)(ii)-(iii).

> genitourinary, hemic and lymphatic, skin, and endocrine.
>
> * * *
>
> The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

28 C.F.R. § 35.104; *see also* 29 C.F.R. § 1630.2(h) (ADA regulations promulgated by EEOC) (substantially same definition); 34 C.F.R. § 104.3(j)(2)(i) (Rehabilitation Act regulations) (substantially same definition). The regulations thus do not clearly establish that an obese individual is covered by the acts.

As he did in attempting to show that the applicability of the acts to state prisons was clearly established, Torcasio contends that the caselaw supports his position. Once again, however, we are unpersuaded by his claim. Three of the five cases he cites interpret state anti-discrimination laws, rather than the ADA or the Rehabilitation Act, and thus cannot provide evidence than the federal statutes clearly apply to obese individuals. *See* Appellee's Br. at 30-31 (citing *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987) (obesity may constitute disability under North Dakota law); *Gimello* v. *Agency Rent-A-Car*, 594 A.2d 264, 276 (N.J. Super. Ct. App. Div. 1991) (same under New Jersey law); *State Div. of Human Rights* v. *Xerox Corp.*, 478 N.Y.S.2d 982, 985-86 (App. Div. 1984) (gross obesity may be disability under New York Human Rights Law), *aff'd*, 491 N.Y.S.2d 106 (1985)).

Turning to the cases that actually interpret federal law, we find some support for Torcasio's argument, but not enough to permit a conclusion that the applicability of the laws to the obese was clearly established. As an initial matter, Torcasio concedes that both of the federal law cases he cites — *Cook* v. *State of Rhode Island Dept. of Mental Health*, 10 F.3d 17 (1st Cir. 1993), and *Smaw* v. *Commonwealth of Va. Dept. of State Police*, 862 F. Supp. 1469 (E.D. Va. 1994) — "post-date the commencement of this lawsuit," Appellee's Br. 32. *Smaw*, indeed, was issued after Torcasio was paroled. The cases therefore are only of marginal relevance to the question of whether, *while Torcasio was at Keen Mountain*, it was "clearly established" that a person with Torcasio's condition qualified as an "individual with a disability." Moreover, the holdings of the cases are not particularly helpful to Torcasio: the First Circuit in *Cook* merely affirmed a jury's determination that the particular obese plaintiff in that case qualified as a disabled individual under the Rehabilitation Act, while Magistrate Judge Miller in *Smaw* held that the obese plaintiff in that case "cannot prove that she is 'handicapped' or 'disabled' as required by the Rehabilitation Act and the ADA." *Id.* at 1475. *Smaw* observed further that "it remains unclear whether simple obesity falls within the broad sweep of the definition of physical impairment" under the Rehabilitation Act, *id.* at 1468-69, and, most damagingly for Torcasio, concluded that "[t]he case law and the regulations both point unrelentingly to the conclusion that a claim based on obesity is not likely to succeed under the ADA," *id.* at 1475 (emphasis added).

The only direct authority on the obesity question available at the time of Torcasio's incarceration, other than the statute itself, is a provision in the "interpretative guidance" appendix to EEOC regulations promulgated pursuant to Title I of the ADA. Although of nominal interpretative value, that provision states that "except in rare circumstances, obesity is *not* considered a disabling impairment." 29 C.F.R. § 1630 App. § 1630(2)(j) (emphasis added). While we understand that Torcasio's case might represent one of those "rare circumstances," given that his obesity appears chronic, this regulation nonetheless severely undermines the claim

that it was "clearly established" that obesity is a disability under the ADA.

Various statements in Torcasio's own brief belie his assertion that the applicability of the acts to the obese was clearly established, *see, e.g.*, Appellee's Br. at 32 ("Based on the case law and relevant regulations, morbid obesity with the consequential physical problems suffered by Torcasio *may* very well constitute a disability under the ADA, just as it *may* constitute a handicap under the Rehabilitation Act." (emphasis added)), and our analysis of the statutes, caselaw, and the relevant regulations leads us to conclude that these statements are appropriately equivocal. It simply was not clearly established, at the time of Torcasio's stay at Keen Mountain, that his obesity brought him within the class of individuals protected by the Rehabilitation Act and ADA.

IV.

Finally, even if we were to assume, notwithstanding the above objections, that a "morbidly obese inmate's right to the modification of specific [prison] services and facilities" was clearly established, we would still find the VDOC officials entitled to qualified immunity as to all of Torcasio's claims, because we find that "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987).

The previously-mentioned principles of deference to state prison officials are equally applicable here. The Supreme Court has observed that "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner v. Safley,* 482 U.S. 78, 90 (1987). The court has gone so far as to hold that "even when an institutional restriction infringes a specific *constitutional* guarantee, such as the First Amendment,

the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979) (emphasis added) (citing *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977); *Pell* v. *Procunier*, 417 U.S. 817, 822, 826 (1974); *Procunier* v. *Martinez*, 416 U.S. 396, 412-14 (1974)). *See also Turner*, 482 U.S. at 89 ("[W]hen a prison regulation impinges on inmates' *constitutional rights*, the regulation is valid if it is reasonably related to legitimate penological interests." (emphasis added)). Given the leeway prison officials are accorded where their actions threaten constitutional rights of inmates, it follows *a fortiori* that prison officials enjoy similar flexibility with respect to inmates' statutory rights; in other words, a reasonable official could believe that some accommodations of the disabled that might be required in a public library are not required in prison.

Even the Ninth Circuit — which is, as we mentioned earlier, the only circuit to have squarely held that the Rehabilitation act applies to state prisons — has recognized the force of these principles in addressing "the issue [of] how the Act is to be applied in the prison setting." *Gates* v. *Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994). Recognizing the deference owed state prison administrators, the court noted that

> just as constitutional rights of prisoners must be considered in light of the reasonable requirements of effective prison administration, so must statutory rights applicable to the nation's general population be considered in light of effective prison administration. The Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the reasonable requirement of effective prison administration. It is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights. Thus,

> we deem the applicable standard for the review of the Act's statutory rights in a prison setting to be equivalent to the review of constitutional rights in a prison setting . . .

Id. at 1447. Thus, even the one circuit that applies the Rehabilitation Act to prisons now refuses to scrutinize a claim brought under the Act any more closely than it would an Eighth Amendment claim; in this circuit, as *Taylor* recognized, that is a highly deferential standard.[17] In view of this consensus that any rights prisoners enjoy — including the right of disabled inmates to some degree of accommodation — must be assessed in light of the requirements of prison administration, VDOC officials certainly could certainly have reasonably concluded that their actions were consistent with "a morbidly obese inmate's right to the modification of specific [prison] services and facilities."

VDOC officials took significant steps to address Torcasio's obesity-related grievances. Upon his arrival at Keen Mountain, prison officials first placed Torcasio in the prison infirmary, which was equipped with most of the disability accommodations Torcasio demanded, including side railings and wide bathroom access. *Torcasio* v. *Murray*, 862 F. Supp.1482, 486 (E.D. Va. 1994). Because inmates housed in the infirmary receive less freedom and fewer privileges than other inmates, however, Torcasio himself requested a transfer into the general population, which was granted. Having granted his request to be

17. A panel of this court earlier described Torcasio's complaints as "inconveniences," and ruled that they "do not, objectively, amount to a 'serious deprivation of a basic human need'" that would violate the Eighth Amendment. *Torcasio* v. *Murray*, No. 93-6585, 1993 WL 491310, at **1 (4th Cir. Nov. 15, 1993) (unpublished) (quoting *Strickler* v. *Waters*, 989 F.2d 1375, 1379 (4th Cir. 1993)). Under the Ninth Circuit's standard in *Gates*, therefore, Torcasio's claim that his ADA and Rehabilitation Act rights were violated would lose *on the merits*.

moved into the general inmate population, prison officials further accommodated Torcasio's weight and mobility limitations by (1) providing him with a private cell originally designed to house two inmates, (2) removing the existing beds from that cell and installing in their place a full-size hospital bed equipped with railings, (3) providing reinforced chairs for Torcasio to use in both his cell and the dining hall, and (4) installing mats and handrails in the shower area. These attempts to accommodate Torcasio's condition at Keen Mountain were in keeping with the prior practice of VDOC officials, who, in response to Torcasio's complaints during his confinement at other VDOC facilities, had granted him a step into the shower, a handrail in the shower, a free-standing locker as opposed to a foot-locker, and a CPAP device (equipped with a backup power system to allow the machine to continue functioning if the electricity went out) to assist his breathing while he slept. Appellants' Br. at 31. This portfolio of accommodations of course did not satisfy all of Torcasio's requests, but certainly could have been viewed by a reasonable prison administrator as a satisfactory accommodation of whatever right Torcasio had to modification of prison facilities, providing yet another basis for reversal of the district court's partial denial of qualified immunity.

CONCLUSION

The judgment of the district court is affirmed insofar as it granted the appellants' motion for summary judgment on the grounds of qualified immunity, and reversed insofar as it denied that motion. The case is remanded with instruction to dismiss all claims against the appellants.

AFFIRMED IN PART, REVERSED IN PART

Opinion of the Eastern District of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 3:92CV558

ANTHONY TORCASIO,

Plaintiff-Appellee,

v.

EDWARD W. MURRAY, et al.,

Defendants-Appellants,

O R D E R

In accordance with the accompanying Memorandum Opinion it is ORDERED that:

1. Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART; and

2. The action is REFERRED to United States Magistrate Judge Lowe.

Let the Clerk send a copy of the Memorandum Opinion and Order to plaintiff and counsel for the defendants.

Dated: September 14, 1994 /s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 3:92CV558

ANTHONY TORCASIO,

Plaintiff-Appellee,

v.

EDWARD W. MURRAY, et al.,

Defendants-Appellants,

MEMORANDUM OPINION

Plaintiff, Anthony Torcasio, a Virginia state prisoner proceeding pro se and in forma pauperis, brings this action pursuant to 29 U.S.C. § 794, 42 U.S.C. 1983 and 42 U.S.C. 12132. Jurisdiction is appropriate pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

In his original complaint plaintiff alleged the conditions at the Greensville Correctional Center violated the Constitution and statutes of the United States. By Order entered May 20, 1993, the Court granted defendants' motion for summary judgment on plaintiff's Section 1983 claims and found plaintiff's remaining claims to be moot since plaintiff had been transferred to the Keen Mountain Correctional Center (KMCC). The Court of Appeals for the Fourth Circuit affirmed the dismissal of the constitutional claims but vacated the finding that plaintiff's statutory claims were

rendered moot by his transfer. The Court of Appeals remanded the case for further proceedings to determine whether the facilities at Keen Mountain were the same as those at Greensville, and, if so, whether such facilities violate 29 U.S.C. § 794 or 42 U.S.C. 12132.

On November 29, 1993, plaintiff filed a complaint in the Western District of Virginia, Torcasio v. Murray, 93CV-0655-R, contesting his living conditions at the Keen Mountain Correctional Center. By Order dated December 16, 1993, the case was transferred to this Court. It was redesignated 3:93CV856. By Memorandum and Order entered February 16, 1994, Torcasio v. Murray, 3:92CV558 and Torcasio v. Murray, 3:93CV856 were consolidated.

Plaintiff is a thirty-three year old male. He is 5' 7" tall, weighs in excess of four hundred sixty (460) pounds and has a girth of 78". Plaintiff asserts his obesity causes him to suffer from the following disabilities:

> 1) limited walking range, 2) inability to climb steps or hills, 3) back pain, 4) inability to bend over, 5) cannot stand or lay down for prolonged periods of time, 6) sleep apnea[1], 7) extremely vulnerable to body imbalances.

Upon arrival at KMCC plaintiff was initially placed in the infirmary. The infirmary at KMCC was equipped with handicap facilities, i. e., wheelchair accessible, side railings, wide bathroom access, etc. However, because inmates confined to the infirmary are entitled to less freedom and privileges than other inmates, plaintiff requested he be moved to the general population.

1. Plaintiff asserts the sleep apnea can result in weariness, weakness, memory loss, and potential breathing failure during sleep.

Subsequently, plaintiff was moved to a single occupancy cell equipped with a hospital bed[2] and a reinforced chair. Plaintiff asserts a number of conditions of confinement violated his constitutional and statutory rights. Listed below are plaintiff's claims, the defendants' response indicating what actions they took, and plaintiff's rebuttal to the response.[3]

Claim A: The Shower

1) The showers at KMCC are raised seventeen inches from the floor of the bathroom. There is an eight inch step leading from the bathroom floor to the shower stall. 2) The handrail outside of the stall is too small and improperly located to be of any real assistance to plaintiff. 3) There is no other assistance to help plaintiff enter and exit the stall. 4) The entrance to the shower stall is only 23 1/2" wide. 5) The above deficiencies subject plaintiff to cuts, abrasions, ridicule, and fear of falling whenever using the shower facilities.

Defendants' response: The authorities at KMC constructed bars or handles in plaintiff's shower area in order to facilitate his showering needs. The shower stalls easily accommodate an individual of plaintiff's girth. There are rubber mats on the floor outside the shower which provide protection against wet conditions.

2. The hospital bed had railings to prevent plaintiff from rolling out of bed.

3. Plaintiff's claims are only those issues stated in the first paragraph of each section. Plaintiff's rebuttal is merely a counter to defendants' response.

Plaintiff's rebuttal: The handrails in the shower are inadequate. There are rubber mats in front of the showers but the steps are uncovered and slippery. There is no chair in the shower area for handicapped people to use. Plaintiff can only wash himself with one hand because he must balance himself with the other hand. There should be a chair in the shower area to help plaintiff dry himself off. Defendants were well aware of the health hazards posed to plaintiff by normal shower facilities as evidenced by the notation in his prison medical records from 1991.

Claim B: The Toilet

1) There are no handrails in plaintiff's cell to assist him in the use of his toilet. 2) The failure to provide handrails for plaintiff's toilet has made it difficult for him to use his bathroom.

Defendant's response: Dr. Quinones states that there is no medical reason why defendant's toilet should be a problem.

Plaintiff's rebuttal: Due to plaintiff's great weight his groin and genitals are often submerged in the toilet bowl.

Claim C: The Pod Tables

1) The pod tables do not accommodate someone of plaintiff's girth. 2) The table cuts and bruises plaintiff if he attempts to sit at the pod table facing in.

Defendant's response: Prison authorities have provided plaintiff with a reinforced chair in his cell which he can also use in the pod.

Plaintiff's rebuttal: Plaintiff asserts the defendants knew his bad back prevents him from moving the heavy chair.

Claim D: The Cell Doors

1) The cell doors are 23 1/2 inches wide, accordingly plaintiff is forced to enter the cell sideways. 2) Plaintiff is subject to ridicule and in some instances physical pain from his entry and exit from the cell.

Defendants' response: Defendants have seen plaintiff enter and exit cells without any difficulty. Dr. Quinones is unaware of plaintiff suffering any scrapes or bruises suffered from entering or exiting a cell.

Plaintiff's rebuttal: Plaintiff asserts that he has told the doctor about the scrapes he suffered entering and exiting the cells. Plaintiff asserts that by the time he is able to see the doctor his wounds have healed.

Claim E: Outdoor Recreational Activities

1) The recreation yard is too far from plaintiff's cell. 2) The prison does not offer alternative outdoor recreational activities for someone, like plaintiff who can not walk or stand for long periods of time. 3) There are no suitable chairs for someone of plaintiff's girth in the outdoor recreation yard.

Defendants' response: Dr. Quinones states that he has prescribed walking as part of his medical treatment for plaintiff's condition. Dr. Quinones states that he saw plaintiff walking about the prison without apparent signs of distress. Dr. Quinones further states that plaintiff's

physical condition does not allow him to participate in normal outdoor recreational activities. There are sitting benches and bleachers in the yard at KMCC.

Plaintiff's rebuttal: The seating in the yard is far below the standard that Dr. Quinones prescribed when he ordered a special chair for plaintiff's cell. The benches and tables in the yard are inadequate for plaintiff because they do not provide back support. The seating in the yard is too low and plaintiff had difficulty getting up. Additionally, the seating in the yard is not padded as plaintiff requires to prevent sores. Plaintiff reasserts that the yard is too far from his cell.

Claim F: Indoor Recreational Activities

1) The steel tables in the recreation area do not accommodate a person of plaintiff's girth.
2) Plaintiff's girth prevents him from playing the indoor recreational activities provided by the prison, i.e. weightlifting, pool, pingpong and football.

Defendants' response: Dr. Quinones states that plaintiff's physical condition does not permit him to engage in routine athletics and other activities within the gymnasium and recreational areas.

Claim G: The Building Lobby

1) The lobby area is sometimes wet and slippery. The prison needs to place non-skid matting down in the lobby. Plaintiff's girth makes him more susceptible to slipping and injuring himself severely.

Claim H: The Dining Hall

1) The tables and chairs in the dining hall are inadequate to accommodate a person of plaintiff's girth. 2) Plaintiff is forced to stand in line for long periods of time waiting for his food. 3) Plaintiff's girth subjects him to additional verbal abuse from inmates and correctional officers while maneuvering through the narrow food lines. 4) The floor in the dining hall can become wet and slippery, especially in front of the tray window. The prison needs to place non-skid matting down in potentially hazardous areas throughout the dining hall.

Claim I: Medical Transportation

There are no vehicles at Keen Mountain for transporting the disabled. Plaintiff is forced to step on milk crates in order to enter or exit the vehicles at the prison.

Claim J: Personal Aid

1) The prison refuses to provide aid to plaintiff in his daily life functions such as dressing, personal hygiene, and cell maintenance. 2) At night, the prison does not provide plaintiff with an adequate means of signaling the staff in case of a medical emergency. There is a call button in plaintiff's cell, however the guards do not respond in a timely fashion, when they respond at all.

Claim K: The Commissary Window/Pill Line

There is no seating offered at the commissary window or pill line.

Claim L: The Location of the Housing Unit

1) Plaintiff's housing unit is located over one hundred yards away from every other support facilities, i.e. gym, medical, law library, etc.
2) Plaintiff's weight makes it difficult for him to make the frequent trips to the support facilities.

Defendants' response: Plaintiff's cell is on the first floor in a pod that is the closest to the canteen, medical department, and pill line. Additionally, Dr. Quinones has prescribed walking as part of plaintiff's medical treatment. Plaintiff is given extra time to get from place to place.

Plaintiff's rebuttal: Plaintiff is not given extra time to get from place to place.

Claim M: The Plaintiff's Cell

1) Plaintiff's cell is too small to accommodate plaintiff and his larger than regulation bed.
2) Plaintiff asserts that he is unable to effectively use the sink in his cell because of his back.

Defendants' response: Plaintiff was given a single occupancy cell even though many of the cells of the same size at KMC house two inmates. Dr. Quinones asserts there is no medical reason why plaintiff should be unable to use the sink in his cell.

Plaintiff's rebuttal: Plaintiff's bed was inadequate and once broke under his weight. Plaintiff is unable to stand for long periods of time. Plaintiff can not use a chair to use the sink because of the cramped quarters in his cell.

Claim N: Complaints Related to Confinement at Nottoway Correctional Center Infirmary Between March 19 and April 22, 1993

1) The lights in the infirmary were left on twenty-four hours a day causing plaintiff headaches. 2) There were no hand rails in the showers and toilet. 3) Plaintiff was denied the same privileges as members of the general population. 4) Plaintiff was verbally abused by correctional officers. 5) There was no handicapped transportation available at Nottoway. Plaintiff had to step on a milk crate in order to enter and exit the prison van. There were no seat belts in the prison van.

Defendants' response: Plaintiff was provided with two beds joined together for sleeping. There are no railings in the shower, however, plaintiff never raised this issue while at Nottoway. Plaintiff had access to the gymnasium and recreation yard just as any other general population inmate. The infirmary where plaintiff was housed had television for his viewing. Plaintiff had a special chair to accommodate his weight.

Plaintiff's rebuttal: The beds were on wheels, whenever plaintiff rolled over the beds would split apart. Plaintiff never had an opportunity to address his concerns about the shower to Nurse Epperson. Defendants were well aware of the health hazards posed to-plaintiff by normal shower facilities as evidenced by the notation in his prison medical records form 1991. Plaintiff denies that he ever had access to the recreation yard and gymnasium. Plaintiff did not have a special chair to accommodate his weight. Plaintiff was given a standard plastic prison chair which cracked under

his weight. Plaintiff asserts that he did not get cable television like the other inmates in general population.

During his incarceration in the general population at KMCC and Nottoway Correctional Center (NBC), plaintiff alleges the above conditions of confinement violated (1) the Rehabilitation Act of 1973 (the Act), (2) Title II of the Americans with Disabilities Act (ADA),[4] and (3) his constitutional rights guaranteed by the Eighth and Fourteenth Amendments.

Defendants have moved for summary judgment and plaintiff has responded. On June 28, 1994, plaintiff informed the Court that he had been paroled from prison and was currently residing in Connecticut. Accordingly, the Court must sua sponte consider the scope of its jurisdiction to address plaintiff's claims for relief under the Rehabilitation Act and the ADA. See, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977); La Faut v. Smith, 834 F.2d 389, 395 n.9 (4th Cir. 1987).

The remedies available to plaintiff under the ADA and the Rehabilitation Act are the same. 42 U.S.C. § 12133. Section 12133 provides, "the remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." The United States Court of Appeals for the Fourth Circuit had held that plaintiffs are not entitled to monetary damages under section 794a of the Rehabilitation Act. Eastman v. Virginia Polytechnic Inst. & State University, 939 F.2d 204, 298 (4th Cir. 1991). However, in Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830 (4th Cir. 1994), the Fourth Circuit

4. The Court also construes plaintiff as bringing section 1983 claims premised upon violations of the Rehabilitation Act and the ADA.

overruled its decision in Eastman, holding that under certain circumstances plaintiffs proceeding under the Rehabilitation Act are entitled to the full panoply of legal remedies.[5]

Plaintiff also seeks injunctive relief. Parole moots a prisoner's claim for injunctive relief. La Faut, 939 F.2d at 395; Inmates v. Owens, 561 F.2d 560 (4th Cir. 1977) (holding that with the exception of one inmate who was rearrested but did not appeal, all other inmates who sought injunctive relief relating to the conditions of confinement complained of were no longer subjected to alleged treatment once they were released). Additionally, the possibility that the plaintiff will violate his parole and be returned to the same institution is too speculative to create a valid case or controversy. Clay v. Smith, 949 F.2d 396 (4th Cir. 1991). An Article III Court is without jurisdiction, "to decide questions that cannot affect the rights in the case before them." Id. at 209 (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971)). Accordingly, plaintiff's claims for injunctive relief will be DISMISSED.

Defendants have moved for summary judgment of the following grounds:

1. The Rehabilitation Act of 1973 does not apply to state prisoners;

2. The plaintiff has failed to properly plead a claim under the Rehabilitation Act of 1973;

3. The Americans with Disabilities Act does not apply to state prisoners;

5. The Fourth Circuit's ruling was compelled by the Supreme Court's decision in Franklin v. Gwinnett County Pub. Sch., -- U.S. --, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992).

4. The defendants have not subjected plaintiff to cruel and unusual punishment in violation of the Eighth Amendment;

5. The defendants have not discriminated against plaintiff because of any physical handicap;

6. All defendants are entitled to qualified good faith immunity from a monetary damages award for any violation of plaintiff's rights under 42 U.S.C. § 1983;

7. Defendants Terry and Rosenthal are not proper parties to this lawsuit.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "The Court is obliged to credit the factual asseverations contained in the material before it which favor the party resisting summary judgment and to draw inferences favorable to that party if the inferences are reasonable (however improbable they may seem)." Cole v. Cole, 633 F.2d 1083, 1092 (4th Cir. 1980).

Application of Rehabilitation Act to State Prisoners

Defendants assert that the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., does not apply to state prisoners. Defendants argue that prisoners are a special class of individuals and that Congress never intended the Rehabilitation Act to apply to state prisons.

Section 504 of the Act prohibits a federally funded state program from discriminating against an individual solely on the basis of an individual's handicap. School Bd. of Nassau County v. Arline, 480 U.S. 273, 275 (1987). The plain language of the Act counsels for an expansive interpretation of which entities are regulated by the Act, "No otherwise qualified handicapped

individual . . . shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1982) (emphasis added). Both the stated goals and plain language of the Act indicate that state prisons may be subject to the provisions of the Rehabilitation Act. Harris v. Thigpen, 941 F.2d 1495, 1522 (11th Cir. 1991); Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988); Sites v. McKenzie, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976). Accordingly, the provisions of the Act are applicable to state prisoners.

Legal Sufficiency of Plaintiff's Claim Under the Rehabilitation Act

Defendants next assert that even if the Rehabilitation Act is applicable to state prisoners, plaintiff has failed properly to plead a claim for relief under the Rehabilitation Act. To establish a prima facie case of a violation of section 504, plaintiff must show that: (1) he is a "handicapped person" under the Act; (2) he is otherwise qualified for the program; (3) he is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) the relevant program or activity receives federal financial assistance. Landefeld v. Marion Gen. Hosp. Inc., 994 F.2d 1178, 1180-81 (6th Cir. 1993).

In effect defendants are making a Fed. R. Civ. P. 12(b)(6) motion. Allegations by a pro se plaintiff, however inartfully pleaded, are sufficient to call for an opportunity to offer supporting evidence, unless it is beyond a doubt that plaintiff could prove no set of facts that would entitle him to relief. Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). The claim set forth in the complaint does not specifically allege receipt of federal funds. He does, however, assert the receipt of federal funds in his response to defendants' answer. That is sufficient to act to cure the defect in the complaint. See Elmore v. Corcoran, 913 F.2d 170 (4th Cir. 1990).

Inapplicability of the ADA to State Correctional Facilities

Defendants argue the ADA should not apply to state prisoners for the same reasons they asserted the Rehabilitation Act was inapplicable. In order to establish a claim under Title II of the ADA, plaintiff must be 1) a qualified individual 2) with a disability 3) who by reason of such disability was discriminated against or denied the benefits of the services, programs or activities 4) by a public entity. 42 U.S.C. § 12132. Defendants apparently contend that Congress did not intend the Virginia Department of Corrections to be included within the definition of a public entity. Section 12131 defines the term "public entity" to include any state or local government and any department, agency or special purpose district of a State or local government. 42 U.S.C. § 12131. The Virginia Department of Corrections fits the definition of a "public entity" under the ADA. Id.; Bonner v. Arizona Dep't of Corrections, 714 F.2d 420, 421 (D. Ariz. 1989). One of the stated purposes of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). A number of Courts have also determined that the Americans with Disabilities Act applies to state inmates. See Bonner, 714 F.2d at 421; Noland v. Wheatley, 835 F. Supp. at 66. Additionally, the Architectural and Transportation Barriers Compliance Board has promulgated a series of interim final rules pursuant to Title II of the ADA setting accessibility guidelines for state and local correctional facilities. 59 Fed. Reg. 31676, 31699-711 (June 20, 1994). [Hereafter interim rules ADA Rules]. The ADA is applicable to state prisoners.

Even if the ADA and Rehabilitation Act are applicable to state facilities, defendants assert that they are entitled to qualified immunity for all of their actions. In determining whether the individual defendants are entitled to qualified immunity for their actions, the court considers whether plaintiff alleged any violation of a clearly established right and, if so, whether the defendants' conduct was objectively reasonable. Siegert v. Gilley, 500 U.S. 226, --, 111 S. Ct. 1789, 1793-94 (1991). The court does not assume plaintiff has established a claim; plaintiff must

demonstrate that if the facts as alleged by him are true, a violation clearly has occurred. Siegert, 500 U.S. --, 111 S. Ct. at 1793-94. Accordingly, the Court will address whether plaintiff has established a claim for relief under the Eighth Amendment, the Rehabilitation Act or the ADA prior to addressing merits of defendants' claim for qualified immunity.

Violations of the Eighth Amendment

In order to make out a prima facie case that prison conditions violate the Eighth Amendment, a plaintiff must show both, "(1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials." Williams v. Griffin, 952 F.2d 820, 824 (4th Cir. 1991). However, "because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave for the basis of an Eighth Amendment violation.'" Strickler v. Waters, 989 F.2d 1375, 1380 (4th Cir. 1993) (quoting respectively, Rhodes v. Chapman, 452 U.S. 337, 347 (1981), and Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (in turn quoting Rhodes, 452 U.S. at 347)). Plaintiff's allegations concerning the adequacy of his commode is the only instance in which plaintiff has established a viable Eighth Amendment claim. None of plaintiff's other complaints amount to a serious deprivation of a basic human need coupled with deliberate indifference by prison officials. Accordingly, with the exception of Claim B, all claims based upon the Eighth Amendment will be DISMISSED.

Violations of the Rehabilitation Act and the ADA

Defendants argue that they did not discriminate against plaintiff in violation of the Rehabilitation Act and the ADA[6]. They assert plaintiff was not denied access to any "programs" or "services" because of his disability and that the ADA requires only that "reasonable modifications" be made in order to avoid discrimination. 28 C.F.R. § 35.130(7).

The "services, programs, and activities provided or made available by public entities" are not explicitly defined in Title II of the ADA or the pertinent regulations, 29 C.F.R. § 35.104. However, the appendix to the regulations promulgated pursuant to Title II states:

> Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs and activities provided by State and local government agencies, regardless of the receipt of Federal financial assistance.

29 C.F.R. App. A § 35.102. Under the Rehabilitation Act of 1973, the term "program or activity" was defined to include all of the operations of a department, agency, special purpose district or other instrumentality of a State or local government. 29 U.S.C. § 794(b)(1). 29 C.F.R. §§ 35.149-151 interpreting Title II of the

6. Defendants do not distinguish between their duties owed to plaintiff under the ADA and the Rehabilitation Act. Therefore, for the purposes of addressing this motion the court will hold defendants to the generally higher standards of the ADA.

ADA states that with regard to existing facilities, "[a] public entity shall operate each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 29 C.F.R. § 35.150(a). Moreover, the interim ADA rules deal extensively with accessibility requirements in state correctional facilities. 59 Fed. Reg. 31699-711. Accordingly, the Virginia Department of Corrections is required to make its facilities and programs readily accessible to individuals with disabilities.

In effectuating the policy of making facilities and programs readily accessible to individuals with disabilities, defendants are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, activity or program."[7] 29 C.F.R. § 35.130. "Whether a defendant has made a reasonable accommodation to an individual with a disability is ordinarily a question of fact." Zande v. Wisconsin, 1994 U.S. Dist. Lexis 1772; citing, McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992). Summary judgment may be awarded only when there is no dispute about the nature of the accommodations made and where no reasonable juror could determine the accommodations made were unreasonable. McGregor v. Louisiana State Univ. Bd. of Sup'rs, 3 F.3d 850 (5th Cir 1993). Considering each of plaintiff's complaints in Claims A-F and L-N, the defendants' responses and plaintiff's rebuttal evidence, a reasonable juror could find defendant's accommodations were unreasonable. Claim N presents the further question of whether any responses were made at all.

7. At no point in their motion for summary judgment do defendants assert that they are not required to make a modification because it would, "fundamentally alter the nature of the service, activity, or program." 29 C.F.R. § 35.130.

Qualified Immunity

Qualified immunity insulates government officials from civil damages liability when the officials' actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Evaluating a defense of qualified immunity involves three discrete determinations: (1) identification of the specific right allegedly violated; (2) determination of whether the right was so clearly established as to put a reasonable official on notice of his legal obligations; and (3) evaluation of whether a reasonable official in defendants' situation could have believed his conduct was reasonable. Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990).

In the most general sense, plaintiff has the right to be free from discrimination in the provision of government services pursuant to the ADA and the Rehabilitation Act. But the proper focus is not the right at its most general level, but its application to the particular conduct being challenged. Id. The right must be defined in a particularized sense; its contours must be sufficiently clear that a reasonable official would understand that his conduct violates that right. Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992). In the present case the disputed right is a morbidly obese inmate's right to the modification of specific services and facilities.

For a right to be clearly established, the right's contours must be "sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). A key question is "whether the law was clearly established at the time an action occurred" because "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the

law forbade conduct not previously identified as unlawful. . . ." Harlow, 457 U.S. at 818.[8] An officer must consider whether there are analogous legal principles in other areas which might apply to his current situation, but he is not expected to recognize the significance of a few scattered cases from disparate areas of the law. Gooden, 954 F.2d at 968.

In the present case it is clear that correctional facilities were subject to the provisions of the ADA and Rehabilitation Act. Bonner, 857 F.2d at 562, Harris, 941 F.2d at 1522; Noland, 835 F. Supp. at 66; Sites, 423 F. Supp. at 1196.[9] However, the extent of an institution's affirmative duties to accommodate an individual with plaintiff's disability was not clearly defined. See McGregor, 3 F.2d at 858.[10] Tolerance for a range of reasonable public actions is particularly important for those who must interpret often imprecise or incomplete legal precedent. Swanson v. Powers, 937 F.2d 965, 968 (4th Cir. 1991). Of course this is not to say that defendants are automatically shielded by qualified immunity because the very actions in question have not been previously held unlawful; but it is to say in light of pre-existing law the unlawfulness must be apparent. Gooden, 954 F.2d at 968.

8. Defendants' motion for summary judgment on the issue of qualified immunity does not clearly distinguish between the status of the law under the ADA and Rehabilitation Act at the time of the alleged violations. Accordingly, the Court will hold defendants to the higher standard under either act in ruling on the motion for summary judgment.

9. There has been some doubt as to whether federal correctional facilities are subject to the provisions of the Rehabilitation Act. Williams v. Meese, 926 F.2d 994 (10th Cir. 1991); La Faut, 939 F.2d at 395. However, neither of the above cases indicated that state correctional institutions were not subject to the Rehabilitation Act.

10. No United States Court of Appeals has provided guidance on what might constitute reasonable accommodation of a morbidly obese inmate.

Finally, the Court must determine whether reasonable officials in defendants' positions could have believed that their conduct was lawful. If public officials of reasonable competence could differ on the lawfulness of defendants' actions, the defendants are entitled to qualified immunity. Malley v. Briggs, 475 U.S. 335, 341 (1986). The very nature of the reasonableness test requires the Court to accord interpretative latitude to official judgments. Torchinsky v. Siwinski, 942 F.2d 257 (4th Cir. 1991). Accordingly, officials are entitled to qualified immunity for a violation of the ADA or Rehabilitation Act if their actions could reasonably have been thought to have been consistent with an individual's rights under the respective statutes. Noland, 835 F. Supp. at 488.

Shower (Claim A)

The defendants recognized that they needed to take certain steps in order to accommodate plaintiff's disability with regard to the showers. Defendants subsequently made a number of modifications to the showers and allowed plaintiff to carry his reinforced chair into the pod. Plaintiff's assertion that the defendants should have done more does not defeat their defense of qualified immunity. The proper focus at this point is not whether defendants provided reasonable accommodations within the strictures of a particular statute, but whether defendants could reasonably have believed their actions were consistent with their obligations under the ADA and Rehabilitation Act. Malley 475 U.S. at 341. Finding that defendants could reasonably have believed their actions to be lawful, defendants' motion for summary judgment will be GRANTED on Claim A.

Toilet (Claim B)

Defendants assert that they did not need to provide any special features with regard to his toilet because it was completely adequate for plaintiff's uses. Plaintiff contests the above assertion and states specific problems regarding his ability to use the toilet. There exists a material issue of fact as to whether defendants could have reasonably believed that plaintiff's toilet was adequate

for his uses. Accordingly, defendants' motion for summary judgment will be DENIED on Claim B.

Pod Tables (Claim C)

Defendants recognized that plaintiff could not use the pod tables and assert that they accommodated plaintiff by providing him a reinforced chair in his cell which could be moved into the pod. Plaintiff asserts that he could not move the chair because it was too heavy for him to lift. More importantly, plaintiff asserts that Dr. Quinones knew plaintiff's back would not permit him to move the chair around. Accepting plaintiff's assertions, defendants could not reasonably have believed that they met their obligations to plaintiff by providing him with an impracticable accommodation. Accordingly, plaintiff's motion for summary judgment will be DENIED on Claim C.

Cell Doors (Claim D)

Defendants assert that they did not need to change the cell doors because they had observed plaintiff entering and exiting the cells without any difficulty. Plaintiff asserts that he informed the doctor about the scrapes and bruises he suffered entering and exiting his cell. There exists a material issue of fact as to whether defendants could have reasonably believed that cell doors were adequate for plaintiff's uses. Accordingly, defendant's motion for summary judgment will be DENIED on Claim D.

Outdoor Recreational Activities and Facilities (Claim E)

Defendants contend that the recreational activities and facilities were adequate for the plaintiff. Dr. Quinones asserts that he prescribed walking as part of the treatment for plaintiff's medical condition and that plaintiff's physical condition prohibited him from participating in normal outdoor recreational activities. Plaintiff fails to state what alternative recreational activities the defendants refused to provide. In light of the overall purpose of the yard and plaintiff's prescribed treatment, plaintiff's assertion that the seating in the recreation yard was inadequate will fail to overcome the defense of qualified immunity.

Defendants could reasonably have believed their actions were lawful, therefore, the motion for summary judgment will be GRANTED on Claim E.

Indoor Recreational Activities and Facilities (Claim F)

Dr. Quinones asserts that plaintiff's physical condition prevented him from participating in many of the indoor recreational activities. Plaintiff has failed to assert what alternative activities he requested that defendants have failed to provide. Accordingly, defendants could reasonably have believed their inaction to be lawful. Defendant's motion for summary judgment will be GRANTED on Claim F2. Defendants have not responded to plaintiff's assertion that the tables are inadequate. Accordingly, defendants' motion for summary judgment will be DENIED on Claim F1.

Location of Housing Unit (Claim L)

Defendants assert that they have provided plaintiff with a cell that was located on the first floor and was the closest to a number of support facilities. Additionally, defendants reassert that Dr. Quinones had prescribed walking as part of the plaintiff's medical treatment and that plaintiff was given extra time to get between his different destinations. Plaintiff contends that he was not given extra time to get between different facilities. Defendant's motion for qualified immunity in the selection of plaintiff's housing unit will be GRANTED in part on Claim L. However, there exists a material issue of fact as to whether plaintiff was given extra time to travel between buildings; with respect to that issue defendants' motion for summary judgment will be DENIED in part on Class L.

Plaintiff's Cell (Claim M)

Defendants assert plaintiff was provided with a hospital bed instead of a regular bed; a single occupancy cell, even though a cell of that same size often held two inmates; and a wall locker instead of a floor locker. Dr. Quinones further contends that there was no medical reason why plaintiff could not use his sink.

Plaintiff has responded that the cell was cramped, the bed once broke under his weight and that he could not stand for long periods of time to use the sink. Defendants are entitled to qualified immunity since they could reasonably have believed their actions to have been consistent with an individual's rights under the ADA and Rehabilitation Act. The defendants' motion for summary judgment will be GRANTED on Claim M.

Complaints Related to Confinement at Nottoway Correctional Center Infirmary Between March 19 and April 22, 1993 (Claim N)

Defendants have not addressed plaintiff's complaints concerning verbal abuse by officers, inadequate medical transportation, and the twenty-four hour lighting in the infirmary. Accordingly, to the extent defendants seek summary judgment on claims N1, N4, and N5, the motion will be DENIED. Plaintiff asserts that there were no handrails in the shower or commode and that this confinement to the infirmary denied him access to privileges enjoyed by inmates in the general population. Defendants contend that plaintiff never informed the administration that he needed handrails in the shower area. Defendants also contend that plaintiff was not denied access to any of the privileges available to the inmates in general population. Plaintiff's assertion that the single reference in his medical records is sufficient to put a reasonable official on notice that his actions or inaction was violating the plaintiff's rights is clearly inadequate. Accordingly, defendants' motion for summary judgment will be GRANTED on Claim N2. However, since plaintiff directly refutes the assertion that he was afforded the same privileges as those inmates in general population, a material issue of fact is in dispute and the motion for summary judgment will be DENIED on Claim N3.

The defendants have failed to address plaintiff's Claim G (the building lobby), H (the dining hall), I (medical transportation), J (personal aid), or K (commissary window/pill line). To the extent defendants seek summary judgment on those claims, the motion is DENIED.

Dismissal of Rosenthal and Terry

Defendants have moved for summary judgment of former Attorneys General Rosenthal and Terry. The maintenance of the correctional facilities in Virginia is the province of the Director of the Virginia Department of Corrections. Va. Code § 53.1-10. The Attorney General's interaction with the Department of Corrections is limited to providing legal services and advice. Va. Code §§ 2.1-118 and 2.1-121. Neither Terry or Rosenthal were responsible for the maintenance of state correctional facilities. An attorney offering advice in good faith is not liable for the torts of his client. Buschi v. Kirvan, 775 F.2d 1240, 1250 (1985). Plaintiff fails to state what legal duties Rosenthal and Terry owed him and how those duties were breached. Accordingly, defendants' motion for summary judgment will be GRANTED. All claims against defendants Terry and Rosenthal will be DISMISSED.

The case will be REFERRED to the Honorable David G. Lowe, United States Magistrate Judge, for further action.

An appropriate Order shall issue.

Dated: September 14, 1994

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

Rehabilitation Act of 1973

United States Code
Title 29

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation Comprehensive Services and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or an entire sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2) or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The

terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204), as such sections relate to employment.

§ 794a. Remedies and attorneys fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning as equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Americans with Disabilities Act of 1990

United States Code
Title 42

§ 12101. Findings and purposes

(a) Findings

The Congress finds that --

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,

exclusionary qualification standards and criteria, segregation and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter --

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes --

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual --

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

* * * * * *

SUBCHAPTER II -- PUBLIC SERVICES

Part A -- Prohibition Against Discrimination and Other Generally Acceptable Provisions

§ 12131. Definition

As used in this subchapter:

(1) Public entity

The term "public entity" means --

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that

implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standard applicable to facilities and vehicles covered by this division, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

SEP 22, 1995

Daniel H. Weiner, Esq.
Hughs, Hubbard & Reed
1 Battery Park Plaza
New York, New York 10004-1482

Re: ADA Title II Coverage of Prisons

Dear Mr. Weiner:

This letter responds to your inquiry about the scope of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. Specifically, you requested guidance regarding whether, in the view of the U.S. Department of Justice, state prisons are covered by title II of the ADA.

The Department of Justice is authorized by the ADA to provide what is called "technical assistance" to aid persons or entities in their ADA compliance efforts. 42 U.S.C. § 12206. We are responding to your inquiry pursuant to this authority.

It is the view of the Department of Justice that title II covers state prisons. This is evident from the terms of the ADA statute and the title II regulation. See 42 U.S.C. § 12132 (prohibiting discrimination on the basis of disability by public entities); 28 C.F.R. § 35.102 (describing title II as applicable to all services, programs, and activities provided or made available by public entities). See also 28 C.F.R. § 35.190 (designating the Department of Justice as the agency responsible for implementing

administrative enforcement procedures in all programs, services, and regulatory activities relating to correctional institutions, among others). See also references to correctional institutions in the Department's interpretive guidance to the regulation (preamble) (e.g., 28 C.F.R. § 35.130) and the Title II Technical Assistance Manual published by the Department (e.g., section 2-6.3300.) See also 36 C.F.R. Pt. 1191 App. A; 59 Fed.Reg. 31,676 (ADA Accessibility Guidelines, Interim Final Rule) at 12.1 (containing specific architectural standards for correctional facilities.)

Further, the regulations implementing Section 504 of the Rehabilitation Act of 1973 -- which prohibits discrimination against individuals with disabilities by programs receiving federal financial assistance, and is the basis for title II -- define "program" to include the operations of a department of corrections. See 29 U.S.C. § 794(a); 28 C.F.R. § 42.540(h).

We hope that this information is helpful to you.

Sincerely,

/s/ Sheila Foran

Sheila M. Foran
Attorney
Disability Rights Section

Supreme Court U.S.
FILED
DEC 4 1995
CLERK

No. 95-535

In The

Supreme Court of the United States

October Term, 1995

ANTHONY TORCASIO,

Petitioner,

v.

EDWARD W. MURRAY, DIRECTOR; G. L. BASS, DEPUTY WARDEN; RUFUS FLEMING; DAVID L. ROBINSON; R. J. BECK; AND G. P. DODSON,

Respondents.

On Certiorari Review From The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* ..*passim*

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Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted as a note in* 42 U.S.C.A. § 2000d-1 at 498-99 19

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PRELIMINARY STATEMENT

The United States Court of Appeals for the Fourth Circuit properly determined that the doctrine of qualified immunity protects the respondents, Officials of the Virginia Department of Corrections ("VDOC"), from any monetary damages that might flow from petitioner Anthony Torcasio's 42 U.S.C. § 1983 lawsuit. Torcasio, who claims that his obesity rendered him a "handicapped person" or a "qualified individual with a disability" entitled to the protection of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, is dissatisfied with the extent of the accommodations made for his morbidly obese condition. He concedes, however, that his release from the VDOC moots his claim for injunctive relief; since qualified immunity bars his claim for a monetary judgment, his lawsuit has been properly dismissed.

OPINION BELOW

The opinion of the United States Court of Appeals dated June 29, 1995, affirming the judgment of the district court to the extent that it found the respondents entitled to qualified immunity and reversing to the extent that it did not, is reported as *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995). The decision of the United States District Court for the Eastern District of Virginia, Richmond Division, dated September 14, 1994, is reported under the same style at 862 F. Supp. 1482 (E.D. Va. 1994).

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The respondents are officials of the VDOC. The petitioner, Torcasio, was an inmate who filed successive *pro se* Complaints. His first Complaint challenged certain conditions of confinement at the Greensville Correctional Center. The district court *sua sponte* invoked the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* (App. 2-3). The district court questioned whether the Rehabilitation Act even applied to prisoners, and on May 20, 1993, dismissed the case as moot because Torcasio had been transferred out of the Greensville facility.

Torcasio appealed *pro se*. The court of appeals, establishing the law of the case, found that the matters about which Torcasio complained were mere "inconveniences."[1]

The court of appeals further found that Torcasio's only allegation of injury resulted from a slip, allegedly caused by a lack of anti-slip abrasives around an ice machine. Since Torcasio had suffered no significant injury, and produced no evidence of any harm, the court found no constitutional violation. The court further noted, however, that Torcasio was complaining on appeal that the same matters he had sued about at the Greensville facility also existed at his new prison, the Keen Mountain Correctional Center. The court accordingly found the mootness doctrine inapplicable and remanded the "potential" statutory claims.

Meanwhile Torcasio, still proceeding *pro se*, had filed a 185-page Complaint and Amended Complaint (including "attachments") in another district court. He raised primarily the same allegations as before, only this time

---

[1] *Torcasio v. Murray*, No. 93-6585 (4th Cir. Nov. 15, 1993).

with respect to his new prison, Keen Mountain. He additionally complained about an interim 30-day infirmary stay in the Nottoway Correctional Center. This second case was transferred and then consolidated with the remanded first case. All defendants joined in a summary judgment motion, which motion incorporated by reference the original summary judgment motion. Torcasio responded, and the trial court issued its opinion and order in *Torcasio v. Murray*, 862 F. Supp. 1482 (1994), which was the subject of the appeal underlying *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995). The lower court outlined Torcasio's claims as follows:

A. (1) The showers at Keen Mountain are raised 17 inches from the floor of the bathroom. There is an 8 inch step leading from the bathroom floor to the shower stall.

(2) The handrail outside of the stall is too small and improperly located to be of any real assistance to plaintiff.

(3) There is no other assistance to help plaintiff enter and exit the stall.

(4) The entrance to the shower stall is only 23 1/2 inches wide.

(5) The above deficiencies subject plaintiff to cuts, abrasions, ridicule, and fear of falling whenever using the shower facilities.

B. (1) There are no handrails in plaintiff's cell to assist him in the use of his toilet.

(2) The failure to provide handrails for plaintiff's toilet has made it difficult for him to use his bathroom. Due to his great weight, Mr. Torcasio's genitals are often submerged in the toilet bowl.

C. (1) The pod tables do not accommodate someone of plaintiff's girth.

(2) The table cuts and bruises plaintiff if he attempts to sit at the pod table facing in.

D. (1) The cell doors are 12 1/2 inches wide, accordingly plaintiff is forced to enter the cell sideways.

(2) Torcasio is subject to ridicule and in some instances physical pain from his entry and exit from the cell.

E. (1) The recreation yard is too far from Torcasio's cell.

(2) The prison does not offer alternative outdoor recreational activities for someone, like Torcasio, who cannot walk or stand for long periods of time.

(3) There are no suitable chairs for someone of plaintiff's girth in the outdoor recreation yard.

F. (1) The steel tables in the recreation area do not accommodate a person of Torcasio's girth.

(2) Torcasio's girth prevents him from playing the indoor recreational activities provided by the prison, i.e., weightlifting, pool, ping-pong and foosball.

G. (1) The lobby area is sometimes wet and slippery. The prison needs to place non-skid matting down in the lobby. Plaintiff's girth makes him more susceptible to slipping and injuring himself severely.

H. (1) The tables and chairs in the dining hall are inadequate to accommodate a person of Torcasio's girth.

(2) Torcasio is forced to stand in line for long periods of time waiting for his food.

(3) Torcasio's girth subjects him to additional verbal abuse from inmates and correctional officers while maneuvering through the narrow food lines.

(4) The floor in the dining hall can become wet and slippery, especially in front of the tray

window. The prison needs to place non-skid matting down in potentially hazardous areas throughout the dining hall.

I. There are no vehicles at Keen Mountain for transporting the disabled. Torcasio is forced to step on milk crates in order to enter or exit the vehicles at the prison.

J. (1) The prison refuses to provide aid to Torcasio in his daily life functions such as dressing, personal hygiene, and cell maintenance.

(2) At night the prison does not provide plaintiff with an adequate means of signaling the staff in case of a medical emergency. There is a call button in plaintiff's cell, however the guards do not respond in a timely fashion, when they respond at all.

K. There is no seating offered at the commissary window or pill line.

L. (1) Torcasio's housing unit is located over one hundred yards away from every other support facility, i.e., gym, law library, etc.

(2) Torcasio's weight makes it difficult for him to make the frequent trips to the support facilities.

M. (1) Torcasio's cell is too small to accommodate him and his larger than regulation bed.

(2) Torcasio asserts that he is unable to effectively use the sink in his cell because of his back.

N. Torcasio complains about Nottoway as follows:

(1) The lights in the Infirmary were left on 24 hours a day causing him headaches.

(2) There were no handrails in the showers and toilet.

(3) Torcasio was denied the same privileges as members of the general population.

(4) Plaintiff was verbally abused by correctional officers.

(5) There was no handicapped transportation available at Nottoway. Plaintiff had to step on a milk crate in order to enter and exit the prison van. There were no seat belts in the prison van.

The district court granted the respondents' motion for summary judgment on Claims A, F2, L in part (location of Torcasio's housing unit), M (cell size and furniture), and N2 (hand rails in the shower area). However, the court denied the respondents' motion for judgment as a matter of law on the basis of qualified immunity as to Claims B, C, D, F1, L in part (travel time between different facilities), N4 (verbal abuse by corrections officers), G, H, I, J, and K, and referred the case to a Magistrate Judge to conduct a hearing.

The defendants immediately appealed, claiming that the district court had erred as a matter of law in finding that the damages claim survived their plea of qualified immunity. The court of appeals considered the question whether the district court erred when it partially denied qualified immunity to the respondents in a suit by a morbidly obese inmate under section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), and Title II of the Americans With Disabilities Act ("ADA"). The court initially determined that the respondents were entitled to qualified immunity for two reasons:

> First, it was not clearly established at that time that the ADA and Rehabilitation Act – the two acts upon which Torcasio's claim of a right to modification of services and facilities is predicated – applied to state prisons. Second, even if it were clear that Torcasio, as a prisoner in a state facility, was protected by the Rehabilitation Act and the ADA, it was not clearly established

> that, as a "morbidly obese" individual, he qualified as an "individual with a disability" protected under either act.

Torcasio, supra, 57 F.3d at 1343-44.

The Fourth Circuit then found, as a third alternative basis validating the defendants' protection from a money damages award, that the prison officials could, as a matter of law, reasonably have thought they acted lawfully.

> Finally, even if we were to assume, notwithstanding the above objections, that "a morbidly obese inmate's right to the modification of specific [prison] services and facilities" was clearly established, we would still find the VDOC officials entitled to qualified immunity as to all of Torcasio's claims, because we find that "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

57 F.3d at 1355.

Contrary to Torcasio's assertions, the question of the applicability of the Rehabilitation Act and the ADA to state prisons was not decided by the court below.

SUMMARY OF ARGUMENT

The sole issue in this case is whether the Virginia prison officials that Torcasio sues are entitled to qualified immunity from his claim for damages from them. In order to avoid the result that the Fourth Circuit reached, Torcasio must demonstrate that the ADA and/or the Rehabilitation Act clearly required these officials to provide him the various amenities of prison life that he claimed in his lawsuit.

Justice Powell, sitting by designation on the Fourth Circuit, has succinctly summarized the state of the law relative to qualified immunity:

> Government officials performing discretionary functions are shielded from civil liability to the extent their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects all such officials unless the law clearly prohibited the action taken. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).
>
> * * *
>
> For the purpose of determining whether a defendant is entitled to qualified immunity the plaintiff's rights must be clearly established under the particular circumstances confronting the official at the time of the questioned action. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The right of the plaintiff must be established so clearly that a reasonable official would know what he is doing violates that right. *Ibid.* Where there is a legitimate question as to whether the officer's conduct would objectively violate the plaintiff's right, qualified immunity "gives police officers the necessary latitude to pursue their [duties] without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law." *Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987).

Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

Continuing with his analysis of the law of qualified immunity, Justice Powell succinctly explains the distinction between the law relative to the merits of the case, and the law relative to qualified immunity:

> That issue reaches the merits of the case, but qualified immunity affords government officials greater protection than a simple defense on the merits. *See Mitchell*, 472 U.S. at 526. Furthermore, the purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury. *Ibid.* A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information *could* have believed that his conduct was lawful. *Anderson*, 483 U.S. at 641.

Slattery v. Rizzo, supra, 939 F.2d at 216.

The Fourth Circuit's analysis of the good faith issue contains three prongs: (1) The law was not clearly established that either the ADA or the Rehabilitation Act clearly applied to the internal operations of state prisons; (2) the law was not clearly established that an obese person such as Torcasio would be entitled to invoke the protections of either Act; and (3) in any event, the law certainly was not clearly established that the many accommodations prison officials made for Torcasio would be inadequate to satisfy the requirements of either Act. A favorable determination relative to any one of the three areas of analysis necessarily results in a determination that the defendants are entitled to good faith immunity.

The Fourth Circuit has described many of the accommodations made for Torcasio, including the provision of a private cell intended to house two inmates; the removal of the bed from his cell and installation of a full-sized hospital bed equipped with railings; the provision of reinforced chairs for him to use in his cell and in the dining hall; the installation of mats and handrails in the shower area; the placement of a step to ease his shower ingress and egress; placement of a handrail in the shower;

the placement of a free-standing locker in his cell as opposed to a footlocker; and the utilization of a device designed to assist his breathing while he slept. Certainly it is beyond question that no law clearly required these officials to do more for Torcasio. The fact that legal scholars can later debate whether either Act might have required more does not mean that these officials are subject to a monetary damages award simply because they failed to contemplate every conceivable ramification of two federal laws, neither of which clearly was ever intended to impact the operations of a state prison. The Fourth Circuit's analysis is a sound one; it is in accordance with every existing good faith immunity principle that this Court has ever articulated; and it is not in conflict with any other good faith immunity case out of any of the federal circuits.

REASONS FOR DENYING THE WRIT

I. THE DECISION RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *TORCASIO V. MURRAY*, 57 F.3D 1340 (1995), DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE STANDARDS APPLICABLE TO THE PROPER DETERMINATION OF THE RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY.

The sole question squarely addressed by the court below was whether the respondents were entitled to the defense of qualified immunity. The court below employed no novel standard and created no "conflicts" of authority in its analysis of the respondents' entitlement to the defense of qualified immunity. Rather, the decision applies black letter qualified immunity law.

1. THE COURT BELOW APPLIED CLEARLY ESTABLISHED QUALIFIED IMMUNITY ANALYSIS

The court of appeals commenced its qualified immunity analysis with its own decision in *Dimeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995), *quoting Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The court stated the elementary principle that "[g]overnment officials are protected by qualified immunity 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' " *Torcasio, supra*, 57 F.3d at 1343. Following this Court's precedent of *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), as applied in *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990), the court noted that "[i]n analyzing a claim of qualified immunity it is . . . necessary first to identify the specific right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that right." *Collinson v. Gott, supra*, 895 F.2d at 998.

This Court only recently reaffirmed that this analysis is apt to "the purely legal issue what law was 'clearly established' " in *Johnson v. Jones*, ___ U.S. ___, ___, 115 S.Ct. 2151, 2155-56, 132 L.Ed.2d 238, 247 (1995):[2]

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[2] The decision in *Johnson* raises the specter of whether the district court's judgment denying qualified immunity was immediately appealable. Torcasio does not reference the question in his Petition, and with good reason. Each of the three prongs of the Fourth Circuit's analysis fits squarely within the *Mitchell* rule of immediate appealability. The facts material to the qualified immunity analysis are not in dispute. Torcasio doesn't question that prison officials did many things to accommodate his physical condition, *see* 57 F.3d at 1356; however, he

> [I]n *Mitchell v. Forsyth*, [*supra*], 472 U.S. 511, this Court held that a district court's order

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complains that they did not go "far enough." *See, e.g.*, Petition at p. 7. The qualified immunity analysis presumes that there are "things" that Torcasio wanted, but didn't get. The relevant question is whether these defendants violated a clear legal right Torcasio had to each of the many "things" the district court identified him as wanting. *See* Brief in Opposition, *supra* at p. 6.

The distinction between disputed facts that may be material to the ultimate question of liability and the existence of undisputed facts that control the qualified immunity analysis is inherent in the *Johnson* decision, and has already been recognized by numerous courts of appeal. *E.g. Stella v. Kelley*, 63 F.3d 71 (1st Cir. 1995) (*Johnson* "permits immediate review of the rejection of a qualified immunity claim when the issue appealed concerns not what facts the litigants might (or might not) be able to prove, but, rather, whether a given set of facts shows a violation of a federally protected right, [thus permitting] immediate review of a trial court's order in this respect"); *Rivera v. Senkowski*, 62 F.3d 80 (2nd Cir. 1995) (*Johnson* permits immediate review of Appellants' immunity defense to the extent it could be decided as a matter of law, based on the undisputed facts and in isolation from the remaining issues of the case); *Rodriguez v. Phillips*, 66 F.3d 470 (2nd Cir. 1995) ("Johnson" does not disturb the rule that whether a disputed fact is material is a question of law and therefore, in the qualified immunity context, a finding of materiality is subject to prompt *de novo* review"); *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir. 1995) (a district court's denial of summary judgment which is premised in part on the existence of fact issues, is immediately appealable where the factual dispute does not affect the defendants' right to qualified immunity); *Rambo v. Daley*, ___ F.3d ___, 1995 U.S. App. Lexis 30906, No. 94-3441 (7th Cir., Oct. 27, 1995) ("[O]ne large 'exception' [to *Johnson*] allows public officials asserting a defense of qualified immunity to appeal the denial of summary judgment where the issue on appeal is limited to 'whether or not certain given facts show [ ] a violation of clearly established law' "); *Reece v. Groose*, 60 F.3d 487 (8th Cir., July 20, 1995) (in recognizing that the issue of qualified immunity is itself fact intensive, the Eighth Circuit

> denying a defendant's motion for summary judgment was an immediately appealable "collateral order" (*i.e.*, a "final decision") under *Cohen [v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)], where (1) the defendant was a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of "clearly established" law. *Id.*, at 528 . . . ; *see Harlow v. Fitzgerald*, [*supra*] 457 U.S. 800, 818 . . . (holding that public officials are entitled to a "qualified immunity" from "liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known"). Applying *Cohen*'s criteria, the *Mitchell* Court held that this kind of summary judgment was, in a sense, "effectively unreviewable," for review after trial would come too late to vindicate one important purpose of "qualified immunity" – namely, protecting public officials, not simply from liability, but

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held that *Johnson* does not prevent interlocutory appeal of the trial court's denial of qualified immunity in order to determine whether a reasonable official could have believed, in light of the facts known at the time, that her actions did not violate plaintiff's constitutional rights); *Babb v. Lake City Community College*, 1995 U.S. App. Lexis 2789, No. 94-2841 (11th Cir., Oct. 5, 1995) (*Johnson* permits an interlocutory appeal from the district court's denial of qualified immunity where the issue on appeal is whether the undisputed facts show a violation of clearly established law).

It also should be noted that the Fourth Circuit handed down its decision in *Torcasio* over two weeks after this Court decided *Johnson*. The Fourth Circuit obviously was aware of *Johnson* when it decided *Torcasio*.

> also from standing trial. *Mitchell, supra,* at 525-527 . . . For related reasons, the Court found that the order was conclusive, *i.e.,* it "conclusively" settled the question of the defendant's immunity from suit. 427 U.S. at 427. . . .

Torcasio's misapprehension of the qualified immunity defense involves what this Court in *Johnson* characterized as the " 'separability' question," that is, "whether or not the 'qualified immunity' issue was 'completely separate from the merits of the action.*' ", ___ U.S. at ___, 115 S.Ct. at 2156, 132 L.Ed.2d at 246 (*citation omitted). Thus, his argument is fatally flawed in its insistence that the court below was first constrained to address the substance of his claims under the Rehabilitation Act and the ADA *before* addressing the question of the respondents' entitlement to qualified immunity. As the *Mitchell* Court held and the *Johnson* Court reiterated, "the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct" is conceptually distinct from address of "the merits of the plaintiff's claim that his rights have been violated.*" *Johnson v. Jones,* ___ U.S. at ___, 115 S.Ct. at 2156, 132 L.Ed.2d at 246 (*citation omitted).

The magnitude of the analytical error in Torcasio's topsy-turvy analysis of the judgment of the court below may thus be readily discerned. His argument that the Fourth Circuit should first have addressed the merits of his Rehabilitation Act and ADA claims, by conducting an "individualized inquiry" about the nature and extent of Torcasio's alleged disabilities,[3] *before* addressing the legal question "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions," conflates the questions which this

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[3] *See* Petition at p. 24.

Court has repeatedly ruled must be analyzed separately and in the appropriate order. Torcasio's basic incomprehension of the appropriate ordination of the elements of the qualified immunity analysis is repeated throughout his Petition.[4]

2. EXISTING LAW DID NOT CLEARLY ESTABLISH TORCASIO'S ENTITLEMENT TO FURTHER ACCOMMODATIONS OF HIS PHYSICAL OBESITY

A. TORCASIO'S *POST HOC* PARSING OF ARCANE NUANCES OF REGULATORY PROVISIONS CANNOT MAKE THE LAW CLEARLY ESTABLISHED

Torcasio makes much ado about federal regulations promulgated pursuant to the Rehabilitation Act by various federal agencies and boards, in an effort to demonstrate the "clear application" of the Act to state inmates.[5] In support of this portion of his argument, Torcasio cites

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[4] *See, e.g.*, Petition at pp. 5, 9, 10, 15-16 (contending that the decision of the court below is "inextricably tied to the substance of the Acts"), and 22 through 25.

See also, Sup. Ct. R. 15. Torcasio's Petition includes a number of misstatements which the respondents are constrained by this Court's Rule 15 to note, as follows:

Petition at pp. 3, 9, 13, 14, and 15 states that the Court below essentially ruled that the Rehabilitation Act and the ADA do not apply to state prisons. This is not correct. *Cf. Torcasio*, 57 F.3d at 1352.

Petition at p. 4 states that Congress "guaranteed" the protections of the Rehabilitation Act and the ADA to "all disabled state prisoners." This is not correct. One searches both acts in vain for any reference whatsoever to state prisoners, as the *Torcasio* Court noted, 57 F.3d at 1345-46.

[5] *See* Petition at pp. 18-20.

(1) a September 22, 1995 letter addressed to the petitioner's counsel from the Department of Justice which refers him, *inter alia*, to 28 C.F.R. § 42.540(h); (2) a "general rule of statutory construction that courts should exercise deference with regard to administrative interpretations"; (3) 28 C.F.R. § 42.540(h) and (j); (4) a 1980 regulatory preamble reported at 45 Fed. Reg. 37620, 37630 (1980); and (5) 28 C.F.R. § 39.170(d)(ii), which requires a *federal* inmate to exhaust *federal* Bureau of Prisons administrative remedies prior to *filing* a Rehabilitation Act Complaint.

Torcasio's reliance on the cited authority shows, again, his basic misapprehension of the qualified immunity analysis. A September 1995 letter, solicited by and addressed to the petitioner's counsel in contemplation of filing the petition instantly opposed, cannot by any flight even of Torcasio's generous fancy be construed as "clearly establishing" for these respondents *prior to the commencement of Torcasio's action in the district court* either the law which they allegedly violated or Torcasio's specific right as an obese individual to invoke that law.[6]

Torcasio's reliance on a 1980 regulatory preamble is also inapt. Assuming, *arguendo*, the "reasonableness" of requiring the respondent Virginia prison administrators to be adept in the esoterica of the Federal Register, such fabulous knowledge would neither warn them of their

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[6] Neither the federal regulations cited in the September 1995 letter nor the 1980 regulatory preamble were cited by Torcasio in his Fourth Circuit brief below, a brief prepared by his counsel in this Court. Certainly, a rule of law which relies for its validity on such arcane parsing of the Federal Register as that proffered by Torcasio, for the first time since the commencement of these proceedings, in his Petition at pp. 17-20, cannot reasonably be considered "clearly established" for these respondent state prison administrators.

potential liability to Torcasio for money damages nor advise them that their many attempts to accommodate Torcasio's ever-expanding list of grievances would be inadequate to avoid that liability. In the cited preamble, the Attorney General described section 504 as prohibiting *employment* discrimination by recipients of federal financial assistance. 45 Fed. Reg. 37620, 37628 (June 3, 1980); *accord, Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).[7] Torcasio never alleged that he was either a VDOC

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[7] In *Darrone*, this Court held that a private damages action for *employment discrimination* against the handicapped can be maintained against an *employer* receiving federal financial assistance. The Court in *Darrone* expressly refused to decide the extent of money damages available under section 504. 465 U.S. at 630. Nor did the *Darrone* court expressly define "program or activity." Nevertheless, the legislative history, executive interpretation, and the Rehabilitation Act's originating purpose were to promote and expand employment opportunities for the handicapped. *See, e.g.*, S. Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); S. Rep. No. 93-319, 93d Cong., 1st Sess. 2, 8 (1973); H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 16, 18, 23-29, 34, 38, 42-43 (1978); S. Rep. No. 95-890, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978). Subsequent amendments of the Act were required to extend its proscriptions to federal contractors and education programs receiving federal funds.

At the time that *Darrone* was decided, the courts were divided on the question whether an institutional or "specific program" approach was implied by the Rehabilitation Act's jurisdictional predicate of receipt of federal funding by the target "program and activity." *Cf. Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981) (Section 504 applied to program even though it did not directly receive financial funds although other entities of university did) *with Gallagher v. Pontiac School Dist.*, 807 F.2d 75, 80 (6th Cir. 1986) (program-specific limitations of §§ 901, 902 of Title IX apply by analogy).

This Court found a private cause of action, again for *employment* discrimination, in all federally funded education

employee[8] or that the VDOC was a recipient of federal financial assistance. The receipt of federal funds is a jurisdictional predicate of a Rehabilitation Act claim. *See, e.g., U.S. Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 604 (1986) (section 504 action requires identification of the recipient of federal assistance).

In light of the relevant case law, the "conflict" which Torcasio posits between the lower court's *dicta* and federal regulations promulgated under the Rehabilitation Act may be seen merely as the product of his wishful thinking. Torcasio's idiosyncratic interpretation of the regulations does not create a predicate for *certiorari* review within 28 U.S.C. § 1254(1); Sup. Ct. R. 10.

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programs, *analogous to* – not identical to or predicated upon – section 504, in Title IX. *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

[8] In his Petition for Certiorari, Torcasio concedes that the absence of an employment relationship was fatal to the claims of the federal inmate in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). Petition, p. 12 at n. 6. The contortions through which Torcasio must go to argue that *Williams* is really an employment law case, and not decided strictly on the basis of the plaintiff's status as an inmate, simply reinforces the absence of clearly compelling legal precedent. The Fourth Circuit clearly has much the better of the argument, both on the import of *Williams*, and its meaning for qualified immunity. *Torcasio, supra*, 57 F.3d at 1350. And we would be remiss not to point out that the district court's first opinion in this very proceeding also construed *Williams* as finding the Rehabilitation Act inapplicable to prisons. ("One court has held that § 794 does not apply to prison facilities because a prison is not a 'program or activity' covered by the section.")

B. THE REFERENCED REGULATIONS CANNOT COMPENSATE FOR THE ABSENCE OF CLEAR CONGRESSIONAL INTENT

There is no way to avoid Torcasio's obvious intent to have this Court rule that the ADA and Rehabilitation Act apply to state prisons in each and every facet of prison life. That strikes us as an odd utilization of this Court's *certiorari* jurisdiction in what is, at its bottom line, a relatively straightforward qualified immunity case. Nonetheless, because of his insistence, we feel compelled to address the matter, at least briefly.

Even apart from a qualified immunity analysis, Torcasio's argument from "general rules of statutory construction" ignores a specific constitutional constraint imposed by our system of federalism. Although pre-emption may result from "a federal agency acting within the scope of its congressionally delegated authority,*" *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 371 (1986) (*citation omitted), as this Court observed, "[t]he critical question in any pre-emption analysis is always whether Congress *intended* that federal regulation supersede state law.*" *Id.* (*Citation omitted.) (Emphasis supplied.) Deferral to the agency's interpretation of the Rehabilitation Act is particularly inappropriate under the very rule of construction asserted by Torcasio, since the authority of the Department of Justice to promulgate regulations pursuant to that act comes not from Congress but from the Executive Branch. Executive Order 12250 (1980).[9] Like his argument predicated on a 1980 regulatory preamble, Torcasio's argument predicated on "general rules of statutory construction" ignores the "reasonableness" element of the qualified immunity

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[9] By way of contrast, Congress has charged the Department of Justice to issue regulations implementing Title II of the ADA. *Torcasio, supra*, 57 F.3d at 135-52, *citing* 42 U.S.C. § 12134.

analysis. Intoning "general rules of statutory construction" is a woefully inadequate way to show (1) that either the ADA or the Rehabilitation Act "clearly" applies to state prisoners; (2) that an obese inmate "clearly" is covered under either act; or (3) that existing law "clearly" established Torcasio's entitlement to those "things" he says prison officials did not do for him.

As the *Torcasio* court noted, "[i]t cannot be disputed that the management of state prisons is a core state function." 57 F.3d at 1345. Quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), the Fourth Circuit noted that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." 57 F.3d at 1345. Thus, Congressional intent to apply either act to state prisons is the starting point for analysis.

The first place to look for expressions of *Congressional* intent is the statute itself. *U.S. Dept. of Transportation v. Paralyzed Veterans of America, supra*, 477 U.S. at 604. The court below concluded:

> Given the significant implications of application of the ADA and Rehabilitation Act for the management of state prisons, and therefore for federal-state relations, we simply cannot agree with Torcasio's assertion that the broad, nonspecific language contained in the isolated portions of the acts upon which he focuses "clearly establishes" that state prisons are within the acts' coverage. Because the management of state prisons implicates "decision[s] of the most fundamental sort for a sovereign entity,"* Congress must speak unequivocally before we will conclude that it has "clearly" subjected state prisons to its enactments.

57 F.3d at 1346 (*citation omitted). As this Court noted with approval in *Kelly v. Robinson*, 479 U.S. 36 (1986):

> Justice Frankfurter advocated a similar approach to the interpretation of regulatory statutes that infringe upon important state interests: "The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit."

479 U.S. at 51 n. 11, *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947). Nothing in the regulatory authorities on which Torcasio relies shows a clear Congressional intent radically to readjust a state's authority to manage state prisons, which readjustment adoption of Torcasio's interpretation of the acts at issue would effect.

C. NO EXISTING CASE AUTHORITY CLEARLY ESTABLISHES THE APPLICATION OF THE ADA OR THE REHABILITATION ACT TO STATE PRISONS, SO AS TO CHANGE THE QUALIFIED IMMUNITY ANALYSIS

The obvious lack of a clear Congressional intent brings us right back to what this case is all about – qualified immunity: what must prison officials have

known the law required, and when must they have known it. As the court below so clearly noted, no controlling authority compels the conclusion Torcasio seeks.

Torcasio concedes that the court of appeals for the Fourth Circuit is the only court of appeals to have addressed "the specific issue of the ADA's coverage of state prisoners."[10] Only two federal circuit courts of appeal have faced state inmate claims against state prisons arising under section 504 of the Rehabilitation Act, the Ninth Circuit in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) and *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), and the Eleventh Circuit in *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). None of the three cases had anything to do with the issue of qualified immunity for prison officials who must wrestle with attempting to discern what particular measures might be thought necessary to implement the Act in a state prison, even assuming the Act applies. Moreover, as the Fourth Circuit found, none of the cases make it "clear" to a Virginia prison official that the Act requires anything of him or her.

The question of the inmates' standing under section 504 was not even squarely before the court in *Harris v. Thigpen*, since the Alabama Department of Corrections defending that underlying action conceded the applicability of section 504 to inmate lawsuits. The instant respondents do not so concede.

As the court in *Harris v. Thigpen*, 941 F.2d at 1522 n.41 observed, the court in *Bonner v. Lewis*, 857 F.2d at 562, did not definitively rule on the standing question, but merely "suggest[ed] that prisoner claims are *potentially* cognizable" under the cited section. In both cases the courts first

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[10] Petition at p. 14. As noted above, that address is in the form of *dicta*, and was not a basis for the lower Court's finding that the respondents were entitled to qualified immunity.

found that the inmate claimants had either actual handicapping conditions (deafness in *Bonner*) or perceived handicapping conditions (seropositivity for the HIV in *Harris*). The court in *Harris* found that the perceived handicapping condition had been the basis of a regulation imposing "blanket, differential treatment of seropositive inmates with regard to available activities and programs" based solely on the fact of seropositivity without regard to the infected inmates' actual expression of symptoms. 941 F.2d at 1524. The inmate in *Bonner* had an independent right under Arizona law to the specific assistive service, that is, a sign language interpreter, which he requested in that case. 857 F.2d at 564.

Nor did the court in *Gates v. Rowland* face a standing challenge to section 504. Rather, that court was asked to interpret a consent decree under which California prison officials had agreed to provide more than the legally required minimum remedies to California state inmates whose handicapping condition of HIV-seropositivity was not challenged by those prison officials. Like the Alabama inmates in *Harris v. Thigpen*, the California inmates in *Gates v. Rowland* were aggrieved by a blanket prison policy which segregated them from other inmates and denied them access to jobs and programs open to other inmates who were not seropositive. And, like the Alabama defendants, the California Department of Corrections had conceded – in the latter case, within the terms of the consent decree – "that rights established by section 504 of the Rehabilitation Act of 1973 were implicated." 39 F.3d at 1445. The instant respondents do not so agree.

Review of the relevant universe of three federal courts of appeal decisions shows that in the twenty-two year history of the Rehabilitation Act, *no* federal circuit court has squarely faced the challenge to an inmates' standing under section 504 presented to the court below. The question of whether Torcasio had any rights under the cited section is a far cry from "clearly established."

D. NO CASE AUTHORITY CLEARLY ESTABLISHES THE APPLICATION OF THE ADA OR THE REHABILITATION ACT TO OBESE PERSONS, SO AS TO CHANGE THE QUALIFIED IMMUNITY ANALYSIS

Not only is application of the Act in the first instance not clearly established, but the contours of the Act's application to obese persons is unclear. Obesity *per se* is not a disability as defined by the Rehabilitation Act or the ADA. As far as appellants can determine, no federal court to consider the question has ruled that obesity itself is a disability. Only one state court to consider the question has ruled in favor of the claimant, and in that court, an intermediate appellate court in New York State, the decision was based on a 1974 New York State statute prohibiting employment discrimination, and was constrained by the court's limited right of review of an agency decision under New York State law. All the cases, both state and federal, considering the question of obesity as the basis of a handicap discrimination claim, have done so in the larger context of claims of employment discrimination. Even assuming *arguendo* that Torcasio may assert his obesity as the basis of his disability discrimination claim, he has not cited a single case that even remotely supports his contention that the right he asserts is sufficiently clearly defined to put these respondents on notice of its existence, let alone of its contours.

Of the five cases upon which Torcasio relied below to buttress his argument of a clearly established right, three were decided against the obese claimants, one was decided in favor of the obese claimant but on an obscure provision of New York state law, and only one includes any reference to or discussion of the federal standard

governing a federal disability discrimination claim.[11] Torcasio has not and cannot submit any law or facts

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[11] In his brief below, Torcasio relied on a mere five cases – three of which are state court decisions, including intermediate state court decisions, grounded in state law – to support his argument that the relevant federal statutory definition "clearly establishes" obesity as a disability. Those five cases are *Cook v. Rhode Island Dep't of Mental Health*, 10 F.3d 17 (1st Cir. 1993); *Smaw v. Virginia Dep't of State Police*, 862 F. Supp. 1469, 1474 (E.D. Va. 1994); *Krein v. Marian Manor Nursing Home*, 415 N.W. 2d 793 (N.D. 1987); *State Div. of Human Rights v. Xerox Corp.*, 102 A.D. 2d 543, 480 N.E.2d 695, 491 N.Y.S. 2d 106 (App. Div., 4th Dep't, 1984); and *Gimello v. Agency Rent-A-Car Sys.*, 250 N.J. Super. 339, 594 A.2d 264 (App. Div. 1991). All five cases involve claims of disability-based employment discrimination. All five cases are easily distinguished from the case at bar.

In *Cook v. Rhode Island DMH*, the First Circuit Court of Appeals ruled in favor of a non-disabled morbidly obese section 504 claimant whose obesity had been the basis of discrimination in hiring by the defending employer based on the claimant's *perceived* or *apparent* rather than actual disability. The morbidly obese claimant in *Cook* did not argue that she was disabled thereby.

Smaw v. Virginia DSP involves claims of disability-based discrimination in the employment context, raised under Title I of the ADA rather than section 504 of the Rehabilitation Act. The district court in *Smaw* held that the definition of "disability" within the ADA and the Rehabilitation Act was the same, and proceeded to rule against the obese claimant on both the questions whether obesity was an actual or apparent disability, opining that "specific regulations for the ADA indicate that generally obesity does *not* qualify as a disability." 862 F. Supp. at 1474 (emphasis supplied).

Krein v. Marian Manor Nursing Home is a North Dakota Supreme Court case, dating prior to the enactment of the relevant provisions of the ADA and making absolutely no reference to the Rehabilitation Act, in which the obese claimant alleges discriminatory firing in retaliation for exercise of her rights under the North Dakota workmen's compensation statute and

sufficient to rebut the appellant's entitlement to the defense of qualified good faith immunity.

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based on her "handicapping" condition of obesity. The *Krein* claimant asked that Court to find her obesity a disability entitled to the protection of a North Dakota statute setting forth a state policy against "discriminatory practices" such as "discharge" of an "employee because of physical or mental handicap." The Court ruled against the plaintiff on the "handicap" claim.

The obese claimant in *State Div. of Human Rights v. Xerox Corp.* alleged claims of disability-based discrimination in the defending employer's decision not to hire. The rulings of the intermediate appellate court (one of four in New York State) in that case are based on a 1974 New York state statute as interpreted in 1974 by a state agency to whose decisions the reviewing court was constrained, by other provisions of state law, to grant great deference. Like the North Dakota court, the New York court made absolutely no reference to any provision of federal law. So, although the obese claimant in the New York case won, the substance of her victory leaves Torcasio's obesity-based federal claims utterly unsupported. For reasons analogous to those already articulated concerning the New York and North Dakota cases, the state-statute basis for the decision of the New Jersey intermediate appellate court in *Gimello* provided no guidance to the lower court in deciding the validity of Torcasio's disability claim.

To respondents' knowledge, only one state court case, *Cassita v. Community Foods, Inc.*, 5 Cal. 4th 1050, 856 P.2d 1143, 1993 Cal. LEXIS 4352 (1993), makes specific referrals to the provisions of federal law relevant to Torcasio's claims. Like the five claimants in *Cook, Smaw, Krein, Xerox Corp.* and *Gimello*, the morbidly obese claimant in *Cassita* raised disability-based discrimination claims in the context of discriminatory employment practices.

In *Cassita* the California Supreme Court considered application of the California Fair Employment and Housing Act ("FEHA"), which prohibits employment discrimination on the basis of a person's weight. Like Torcasio, the *Cassita* claimant was morbidly obese. The *Cassita* court reviews the history of FEHA and expressly notes that its definition of a handicap derives from the federal Rehabilitation Act of 1973, 29 U.S.C.

To the extent that a jurisprudence of obesity exists, it is overwhelmingly grounded in state statutes prohibiting

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§ 701 *et seq.*, which definition was subsequently adopted by the ADA. The *Cassita* court observes:

> Although the vast majority of states have enacted statutes prohibiting *employment discrimination* on the basis of disability or handicap . . . there is little uniformity among them and minimal case law interpreting their scope. . . . Only one state, Michigan, has specifically codified a prohibition against *employment discrimination* on the basis of weight. . . . Of the courts that have considered the issue, most have concluded that an individual's weight does not by itself constitute a handicap or disability but may in conjunction with other related disorders . . . under their respective states' antidiscrimination statutes . . .

1993 Cal. LEXIS at 26 n. 11 (emphasis supplied), *citing illustratively Philadelphia Elec. v. Com., Pa. Human Rel.*, 68 Pa. Commw. 212, 448 A.2d 701, 707 (1982) (morbid obesity alone, without other physical consequences, is not a handicap under the Pennsylvania antidiscrimination statute); *Mo. Com'n on Human Rights v. S.W. Bell Tele.*, 699 S.W.2d 75 (Mo. Ct. App. 1985), and *Krein, supra.*

The *Cassita* court also notes that "a widely cited" decision by a federal district court "held that obesity was not a handicap under Washington law because it was not an 'immutable' condition such as blindness or lameness." *Cassita*, 1993 Cal. LEXIS at 26 n. 11, *quoting Greene v. Union Pacific R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981). Having reviewed *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Ca. 1984) (weight lifter with body-builder's bulk caused by voluntary participation in sport of weightlifting has no employment discrimination claim under section 504 for refusal to hire based on weight) and *Cook, supra*, the *Cassita* court opined "[t]hat obesity does not constitute a qualifying disability absent proof of physiological causation under federal law." 1993 Cal. LEXIS at 31:

> In explaining the meaning of disability under the ADA, the federal regulations observe, "It is important to distinguish between conditions that are

discrimination in employment. The courts considering those claims have, for the most part, ruled against the obese claimants. Nothing in this jurisprudence even vaguely supports Torcasio's assertion that the inclusion of obesity within the relevant federal statutory definition of disability is clearly established law. Nor does this jurisprudence of obesity, developed entirely in the context of employment discrimination claims based for the most part on state statutes in states outside of Virginia, put these respondents – Virginia state corrections officials – on notice that the contours of Torcasio's alleged rights as a state inmate allegedly disabled by obesity stretch to cable television service, personal attendants, state-enforced policing of name-calling by other inmates, etc.

In his attempt to create the appearance of a "conflict of authority" among the Circuits on the question whether, at the time of his complaints, the rights of an obese state prison inmate were clearly established, Torcasio once again blurs the conceptual distinction between the threshold legal question of qualified immunity and addressing his claims on the merits. It is beyond cavil that on this record these respondents are entitled to the benefit of the qualified good faith immunity defense.

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impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments." 29 C.F.R. appen. § 1630.2(h) (1992). Examples of the latter include such physical characteristics as "height, weight, or muscle tone" that "are not the result of a physiological disorder."*

Id. at 31-32 (*citation omitted).

II. UPON THE INSTANT RECORD, THE QUESTIONS OF THE APPLICABILITY OF THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT TO STATE PRISONERS' CLAIMS AGAINST STATE PRISONS ARE NOT RIPE FOR *CERTIORARI* REVIEW.

Rule 10.1 of the 1990 Supreme Court Rules ("Sup. Ct. R.") provides that this Court's review pursuant to 28 U.S.C. § 1254(1) "is not a matter of right, but of judicial discretion":

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> When a United States court of appeals has rendered a *decision* in conflict with a *decision* of another United States court of appeals *on the same matter* . . . or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10 (emphasis supplied). Rule 10 is a prudential rule and as such does not limit the power of this Court to determine which questions it may hear. "A prudential rule, however, is more than a precatory admonition." *Izumi Seimitsu Kogyo v. U.S. Phillips Corp.*, ___ U.S. ___, 114 S.Ct. 425, 427 (1993).

In pertinent part, Rule 10 clearly contemplates that it is a decision squarely made, or an egregious abuse of judicial discretion, which will raise the question ripe for this Court's attention upon *certiorari*. Arguments, such as those proposed by Torcasio, against mere *dicta*, however potentially compelling that *dicta*'s suasive force, are more

appropriate to the rarified atmosphere of a law school debating society than to the rigorous work environment of an Article III Court.

Torcasio is simply wrong in his assertion that the court of appeals based its judgment in favor of respondents on rulings about "the applicability of the Acts to state prisons" and on "the proper inquiry for determining whether a specific individual constitutes a disabled person under the Acts." Torcasio's at best merely artful pleading does not bring the decision of the court below within the scope of Rule 10.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 95-535

In The

Supreme Court of the United States

October Term, 1995

ANTHONY TORCASIO,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR;
G. L. BASS, DEPUTY WARDEN; RUFUS FLEMING;
DAVID L. ROBINSON; R. J. BECK; AND G. P. DODSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION

Anthony Torcasio respectfully submits this reply brief in further support of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

This Court should reject respondents' attempt to wish away the clear conflicts raised by the Fourth Circuit's decision. There is no question that: (1) the Fourth Circuit considers neither the Rehabilitation Act of 1973 (the "Rehabilitation Act") nor the Americans with Disabilities Act of 1990 (the "ADA") (collectively, the "Acts") to apply to state prisons; (2) the Fourth Circuit did not conduct an individualized examination of petitioner's impairments in this case before determining that, as a matter of law, he was not "disabled" under the Acts; and (3) the Fourth Circuit violated this Court's recent holding in *Johnson v. Jones*, ____ U.S. ____, 115 S. Ct. 2151 (1995), by ruling that respondents are entitled to qualified immunity despite the existence of many unresolved issues of material fact. Accordingly, the writ of certiorari should issue to review the decision of the Fourth Circuit.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE FEDERAL CIRCUITS AS TO THE ACTS' COVERAGE OF STATE PRISONERS.

By stating that the Acts do not apply to state prisons, and by forcing such an interpretation on the Tenth Circuit's holding in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), the Fourth Circuit's decision in this case creates a clear conflict among the federal circuits with respect to the Acts' coverage of state prison inmates. While respondents attempt to reduce the Fourth Circuit's statements on this issue to

merely "potentially compelling" *dicta* (Opp. Br. 29),[1] that court's opinion speaks plainly in rejecting the decisions of the Ninth Circuit in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), and the Eleventh Circuit in *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991), that the Rehabilitation Act applies to state prisons. Thus, the Fourth Circuit plainly stated: "We are hesitant to extend the coverage of the acts to state prisons . . ." (7a); "Given the significant implications of application of the ADA and Rehabilitation Act for the management of state prisons, and therefore for federal-state relations, we simply cannot agree with Torcasio's assertion that the broad, non-specific language contained in the isolated portions of the acts upon which he focuses 'clearly establishes' that state prisons are within the acts' coverage" (11a); "State prisoners thus do not fit neatly within the definition of 'public entities' to which the ADA applies" (12a n.5); "The recognition that the terms of the ADA and the Rehabilitation Act are ill-fitting, at best, in the context of correctional facilities, reinforces our conclusion that the applicability of the acts to state prisons is far from clear on the face of the laws" (13a-14a); "The [Department of Justice] regulations therefore define the reach of the Rehabilitation Act using the same broad language as does the Act itself; . . . this broad language is insufficient to clearly establish that the Act applies to state prisons" (21a).

The Fourth Circuit's analysis of the applicability of the Acts to state prisons during the period of Torcasio's incarceration (1993 to 1994) would clearly lead it to the same

1. References to "Opp. Br. ____" are to Respondents' Brief in Opposition to the Petition. References to "____a" are to the pages of the Appendix to the Petition.

conclusion were it examining whether the Acts apply to state prisons today. (6a-25a.) At least one lower federal court has already recognized the reach of the Fourth Circuit's decision by relying on it as authority for the proposition that the ADA does not apply to state prisons:

> ". . . the Fourth Circuit has all but held that the ADA, *per se*, does not apply in the state prison context. This court is persuaded by the reasoning and dicta of the Fourth Circuit which states absent clear intent on the part of Congress, its enactments do not apply to integral state functions."

Staples v. Va. Dep't of Corrections, No. 3:94CV469, slip op. at 3 (E.D. Va. July 19, 1995).[2] Respondents omit any discussion of *Staples* and present no reasoned argument that other courts will not also cite the Fourth Circuit's decision in this case as precedent for the proposition that the protections of the Acts do not apply to state prison inmates.

2. *Staples v. Va. Dep't of Corrections* has been reported at 905 F. Supp 487 (E.D. Va. 1995); however, page references are not currently available.

II. THE FOURTH CIRCUIT DEPARTED FROM THE QUALIFIED IMMUNITY STANDARDS EMPLOYED BY THE NINTH AND SECOND CIRCUITS WHEN IT ADJUDICATED THE REASONABLENESS OF RESPONDENTS' ACTIONS DESPITE THE EXISTENCE OF DISPUTED ISSUES OF MATERIAL FACT.

Respondents' assertion that "[t]he facts material to the qualified immunity analysis are not in dispute" (Opp. Br. 11 n.2) squarely contradicts the district court's findings in this case. The district court expressly found that disputed issues of material fact precluded resolution on summary judgment of respondents' qualified immunity defense with respect to several of petitioner's claims. (54a-57a.)[3] The

3. The district court held that: "[t]here exists a material issue of fact as to whether defendants could have reasonably believed that plaintiff's toilet was adequate for his uses" (54a-55a) (emphasis added); "there exists a material issue of fact as to whether defendants could have reasonably believed that cell doors were adequate for plaintiff's uses" (55a) (emphasis added); "there exists a material issue of fact as to whether plaintiff was given extra time to travel between buildings" (56a) (emphasis added); "since plaintiff directly refutes the assertion that he was afforded the same privileges as those inmates in general population, a material issue of fact is in dispute and the motion for summary judgment will be DENIED . . ." (57a) (emphasis added). In addition, the district court denied summary judgment as to five of the petitioner's claims because respondents failed to address those claims. (57a.) It is beyond dispute that the majority of the district court's denials of summary judgment with respect to the respondents' qualified immunity defense were predicated on the existence of disputed issues of material fact.

Fourth Circuit did not disturb the district court's determination that several issues of material fact remain unresolved; nor did it disturb the district court's finding that petitioner had asserted several separate claims corresponding to specific conditions of his confinement. Rather, the Fourth Circuit simply ignored the district court's finding of disputed facts and declared that, while the "portfolio of accommodations" made by respondents "of course did not satisfy all of Torcasio's requests," those limited ameliorative actions suffice as a matter of law to protect respondents under the qualified immunity doctrine. (33a.)

The Fourth Circuit's adjudication of those claims involving disputed factual issues squarely conflicts with the Ninth Circuit's holding in *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), and the Second Circuit's holding in *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 721 (1995), that courts should rule on qualified immunity "only in those cases where the facts concerning the availability of the defense are undisputed. . . ." *Oliveira*, 23 F.3d at 649.

Moreover, while respondents claim that the district court's decision constitutes an immediately appealable collateral order (Opp. Br. 13), this Court has explained that a qualified immunity ruling can constitute a collateral order only where "the issue appealed concern[s]. . . whether or not certain given facts show a violation of 'clearly established' law." *Johnson v. Jones*, 115 S. Ct. 2151, 2155 (1995). The Court thus distinguished reviewable "purely legal" decisions from those nonreviewable orders that, as here, decide "which facts a party may, or may not, be able to prove at trial." *Id.* at 2156. The district court in this case explicitly held that material issues of fact existed which precluded summary judgment on respondents' assertion of a qualified immunity defense. Under *Johnson*, those issues of fact should not even

have been addressed—much less decided—by the Fourth Circuit.

III. THE FOURTH CIRCUIT'S DETERMINATION THAT PETITIONER'S MORBID OBESITY WAS NOT A CLEARLY ESTABLISHED "DISABILITY" CONTRADICTS THE INDIVIDUALLY FOCUSED QUALIFIED IMMUNITY ANALYSIS USED BY THE FIFTH AND SEVENTH CIRCUITS.

Respondents nowhere dispute the Fourth Circuit's reliance on a purely categorical analysis in this case to conclude that neither the ADA nor the Rehabilitation Act apply to the morbidly obese. (26a.) This across-the-board analysis is ludicrous, since it entirely fails to take into consideration the specific physical impairments caused by petitioner's medically diagnosed condition. In contrast to the abstract generalization employed by the Fourth Circuit, both the Fifth and Seventh Circuits properly have held that the Rehabilitation Act requires an individualized, case-by-case determination of "disability." *See Chandler v. Dallas*, 2 F.3d 1385 (5th Cir. 1993); *Byrne v. Bd. of Educ., School of W. Allis*, 979 F.2d 560 (7th Cir. 1992). It was error for the Fourth Circuit to hold otherwise.

CONCLUSION

For the foregoing reasons and the reasons set forth in petitioner's opening memorandum, the petition for a writ of certiorari should be granted.

Dated: New York, New York
January 6, 1996

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